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Mark C. Weber

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BEYOND *PRICE WATERHOUSE V. HOPKINS*: A NEW APPROACH TO MIXED MOTIVE DISCRIMINATION

MARK C. WEBER†

Under the common law of torts, a wrongdoer whose act combines with other forces may be held liable for harm that results, regardless of the other causes, as long as the wrongful act was a dominant or substantial cause of the harm. In employment discrimination cases under Title VII of the Civil Rights Act, however, as the United States Supreme Court recently held in Price Waterhouse v. Hopkins, an employer who acts to the detriment of an employee or applicant based on both a discriminatory motive and a legitimate motive will escape liability if the same action would have resulted from the legitimate motive alone. In this Article Professor Weber argues that the Price Waterhouse Court, although increasing the likelihood of relief by shifting the burden of proof on the cause-in-fact issue to the employer, still has not afforded justice to victims of discrimination. The Article proposes to replace the Court's result with a finding of full liability whenever discrimination plays a part in employment decisions, arguing that such an approach is more consistent with philosophical and legal causation theories, remedial policies, and the statutory provisions of Title VII. The Article concludes that only the undue hardship doctrine, which protects defendants and the public from onerous or wasteful equitable remedies, should prevent the award of full relief when a discriminatory motive contributes to an employment action.

In many employment discrimination cases brought under Title VII,¹ the facts establish that the employer fired or failed to hire or promote the plaintiff for a mixture of discriminatory and legitimate reasons. In *Price Waterhouse v. Hopkins*² a fragmented Supreme Court ruled that in these "mixed motive" cases, the employer may escape liability by proving by a preponderance of the evidence that it would have made the same decision in the absence of discriminatory reasons.³

† Associate Professor of Law, DePaul University. B.A. Columbia University, 1975; J.D. Yale Law School, 1978. I thank my colleagues Susan Bandes, James Colliton, Steven Greenberger, Mary Rita Luecke, Stephen Siegel, and Morrison Torrey for their comments on an early draft of this Article. I also thank Tammie Grossman, Marcia Meis, Michael O'Neil, and Neil Wolf for their research assistance.

1. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

2. 109 S. Ct. 1775 (1989).

3. *Id.* at 1792 (plurality opinion of Justice Brennan); *id.* at 1796 (White, J., concurring). Justice O'Connor filed a separate concurrence in the judgment. *Id.* at 1796 (O'Connor, J., concurring). Chief Justice Rehnquist and Justice Scalia joined in a dissent by Justice Kennedy. *Id.* at 1806 (Kennedy, J., dissenting). The Court reversed the United States Court of Appeals for the District of Columbia Circuit, which had ruled that the employer must prove by clear and convincing evidence that the same decision would have been made absent the discrimination. *Hopkins v. Price*

The dissenters argued that the Court went too far in shifting the burden of proof to the employer;⁴ instead, the employee should have to prove by a preponderance of evidence that the employer would not have made the same decision in the absence of discrimination.⁵

This Article argues that the Supreme Court did not go far enough. In a mixed motive case, the only way for a court to act consistently with precedent, logic, and policy is to find liability and award full relief. Only the undue hardship doctrine, which protects defendants from particularly onerous or wasteful equitable remedies, should limit the recovery.

This Article's new approach to mixed motive discrimination is based not on conventional Title VII jurisprudence but on common-law cases that involve mixed motives or other combined wrongful and innocent causes. In cases of wrongful interference with contract, courts find liability and award full relief upon a showing that the wrongful motive was the dominant one.⁶ In analogous tort cases involving negligent and nonnegligent sources of a single harm, courts find liability and award full relief if the negligent cause is a substantial factor in bringing about the harm.⁷

Philosophical and legal theories of causation also support an approach to mixed motive discrimination that finds liability and awards full relief.⁸ A discriminatory cause is still a cause, even if it is mixed with other factors, and even if those other factors would have produced the same effect in the absence of the discriminatory cause.

Even more importantly, finding liability and awarding full relief in mixed motive cases promotes the remedial policies of compensation, deterrence, and furtherance of the community's sense of justice, and it is consistent with statutory policies.⁹ Although there are possible objections to the proposed approach based on practicality, the objections can be avoided if courts apply the undue hardship doctrine traditionally used in Title VII cases and other actions for equitable relief.¹⁰

Ever since *Mount Healthy City School District Board of Education v. Doyle*,¹¹ an early mixed motive case involving discrimination in violation of the

Waterhouse, 825 F.2d 458, 470-71 (D.C. Cir. 1987), *rev'd*, 109 S. Ct. 1775 (1989). For a more detailed description of the opinions, see *infra* text accompanying notes 26-106.

4. *Price Waterhouse*, 109 S. Ct. at 1812-13 (Kennedy, J., dissenting).

5. *Id.* at 1809 (Kennedy, J., dissenting).

6. See *infra* notes 108-14 and accompanying text.

7. See *infra* notes 115-41 and accompanying text.

8. See *infra* notes 154-82 and accompanying text.

9. See *infra* notes 223-318 and accompanying text.

10. See *infra* notes 319-28 and accompanying text.

11. 429 U.S. 274 (1977). In *Mount Healthy* the Supreme Court reversed a federal district court decision reinstating and giving tenure and back pay to the plaintiff, who was previously an untenured teacher. See *infra* notes 205-13 and accompanying text (discussing *Mount Healthy*). Although the case involved the first amendment rather than the laws forbidding race or sex discrimination, the Court suggested the analogy in two subsequent Title VII cases. *East Tex. Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 404 n.9 (1977); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 367-68 (1977). The hint was not lost on the lower courts. *E.g.*, *Mack v. Cape Elizabeth School Bd.*, 553 F.2d 720, 722 (1st Cir. 1977).

first amendment, courts have ignored the possibility of such an approach.¹² Moreover, while engaging in a robust debate over the positions ultimately taken in the plurality opinion, the concurrences, and the dissent in *Price Waterhouse*, academic critics have summarily rejected this approach. Thus, although several commentators suggest the inconsistency between denying liability and relief in mixed motive cases and imposing them in analogous common-law cases,¹³ and even though they and another authority accept multiple causation paradigms as valid causation theory,¹⁴ all stop short of endorsing liability and full relief in mixed motive cases. The commentators' real, if not fully developed, complaint about the approach is that it violates remedial principles. Nevertheless, a careful analysis of general and statutory remedial policies fails to support the complaint.

Part I of this Article describes mixed motive cases and the Supreme Court's approach to them before *Price Waterhouse*. Part II describes *Price Waterhouse* and its approach. Part III puts forward the common-law solution to the mixed motive problem, discussing cases in which motives determine liability and analogous cases with multiple wrongful and innocent causes of harm. Part IV examines causation theory, comparing the merits of this Article's proposed approach,

12. Courts did adopt such an approach before *Mount Healthy*. See, e.g., *United States v. Hayes Int'l Corp.*, 6 Fair Empl. Prac. Cas. (BNA) 1328, 1330 (N.D. Ala. 1973); see Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 308 & n.75 (collecting cases). By the time *Price Waterhouse* came down, the Circuit Courts of Appeal had taken five different approaches: (1) No violation unless the plaintiff proves that but for the discrimination, the decision would not have been the same, *McQuillen v. Wisconsin Educ. Ass'n Council*, 830 F.2d 659, 664-65 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1068 (1988); *Peters v. City of Shreveport*, 818 F.2d 1148, 1161 (5th Cir. 1987), *cert. dismissed*, 108 S. Ct. 1101 (1988); *Bellisimo v. Westinghouse Elec. Corp.*, 764 F.2d 175, 179 (3d Cir. 1985), *cert. denied*, 475 U.S. 1035 (1986); *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365-66 (4th Cir. 1985); (2) No violation if the defendant proves by a preponderance of evidence that but for the discrimination, the decision would have been the same, *Berl v. County of Westchester*, 849 F.2d 712, 714-15 (2d Cir. 1988); *Terbovitz v. Fiscal Court*, 825 F.2d 111, 115 (6th Cir. 1987); *Fields v. Clark Univ.*, 817 F.2d 931, 936-37 (1st Cir. 1987); *Bell v. Birmingham Linen Serv.*, 715 F.2d 1552, 1557 (11th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984); (3) No violation if the defendant proves by clear and convincing evidence that but for the discrimination, the decision would have been the same, *Toney v. Block*, 705 F.2d 1364, 1366 (D.C. Cir. 1983); (4) Violation, but no award of back pay or reinstatement if the defendant proves by a preponderance of evidence that but for the discrimination, the decision would have been the same, *Bibbs v. Block*, 778 F.2d 1318, 1323-24 (8th Cir. 1985) (en banc); (5) Violation, but no award of backpay or reinstatement if the defendant proves by clear and convincing evidence that but for the discrimination, the decision would have been the same, *Fadhl v. City and County of San Francisco*, 741 F.2d 1163, 1166-67 (9th Cir. 1984). See *Price Waterhouse v. Hopkins*, 109 S. Ct. at 1784 n.2.

13. Brodin, *supra* note 12, at 315 & n.99; Eaton, *Causation in Constitutional Torts*, 67 IOWA L. REV. 443, 454 (1982); Stonefield, *Non-Determinative Discrimination, Mixed Motives, and the Inner Boundary of Discrimination Law*, 35 BUFFALO L. REV. 85, 121 (1986). A seminal critique of *Mount Healthy* is Wolly, *What Hath Mount Healthy Wrought?*, 41 OHIO ST. L.J. 385 (1980). Other discussions of mixed motive discrimination include Note, *Title VII Mixed-Motive Cases: The Eighth Circuit Adds a Second Track of Liability and Remedy*, 36 DRAKE L. REV. 155 (1986-87), and Comment, *Designing Procedure to Suit Title VII's Purpose*: *Bibbs v. Block*, 60 ST. JOHN'S L. REV. 742 (1986). In a recent note, one student commentator suggests that all mixed motive cases should be handled as direct evidence cases. Note, *Clearing the Mixed-Motive Smokescreen: An Approach to Disparate Treatment Under Title VII*, 87 MICH. L. REV. 863, 893-94 (1989) [hereinafter Note, *Mixed-Motive Smokescreen*]. The note, however, fails to evaluate causation in those cases. Although it provides some support for the view of liability and remedy advanced in this Article, see *id.* at 869 n.34, it appears to endorse *Price Waterhouse's* approach for awarding relief, *id.* at 874 n.68, and perhaps even for the imposition of liability, see *id.* at 879-80, 892-93. Apparently it would approve a shift in the burden of persuasion. *Id.* at 883.

14. Belton, *Causation in Employment Discrimination Law*, 34 WAYNE L. REV. 1235, 1244 (1988). See also *supra* note 13 and sources cited therein.

which follows the common law, with those of the *Price Waterhouse* plurality, concurrers, and dissenters. Finally, Part V compares the proposed approach with those of the *Price Waterhouse* Court and the academic commentators with respect to appropriateness of remedy. It considers whether the common-law approach furthers the policy of Title VII of the Civil Rights Act of 1964. Then it answers practical objections to the proposed approach.

I. MIXED MOTIVE DISCRIMINATION

Mixed motive cases are those in which an employer takes action against an employee or applicant both for legitimate reasons, such as misconduct or lack of qualifications, and for discriminatory reasons, such as racial or sexual hostility or stereotypes.

Mixed motive cases are cases of intentional discrimination, because the defendant intentionally treats the victim differently from others on account of an impermissible distinguishing characteristic.¹⁵ Although the defendant has other legitimate intentions, such as the intention to obtain the most productive work force, he nevertheless is motivated in part by an intention to discriminate.

In these cases, the term "motive" is used interchangeably with "intent." Of course, the two terms are not identical in many legal applications. Ordinarily, intentions are immediate objectives, such as the intent to steal, whereas motives are more basic or underlying objectives, such as the motive to be wealthy.¹⁶ The concepts have become blurred because of the analogy between discrimination on the basis of race and sex in violation of Title VII¹⁷ and discrimination against employees in order to encourage or discourage membership in a union in violation of the National Labor Relations Act.¹⁸ The former type of discrimination involves an intent (to disadvantage the black or woman), but the latter type of discrimination involves a motive (to discriminate against the union member *for*

15. Mr. Schnapper has identified two types of discriminatory intent, which correspond roughly to "because of" and "in spite of." Schnapper, *Two Categories of Discriminatory Intent*, 17 HARV. C.R.-C.L. L. REV. 31, 38 (1982). It is clear that antidiscrimination laws bar treating a person worse because the person is black or female. *But see* Feeney v. Massachusetts, 475 F. Supp. 109, 110 (D. Mass. 1979) (implying that a governmental body may knowingly disadvantage blacks, females, or other protected groups to achieve a legitimate objective), *aff'd mem. sub. nom.* Feeney v. Personnel Adm'r, 445 U.S. 901 (1980). "In spite of" intent satisfies criminal intent requirements. Cook, *Act, Intention, and Motive in the Criminal Law*, 26 YALE L.J. 645, 657-59 (1917). The issue of "in spite of" discrimination is beyond the scope of the mixed motive discussion in this Article, which confines itself to illegal discriminatory intent mixed with another, legitimate intention.

16. A wrongful act is seldom desired for its own sake. . . . The evil which he does to another, he does and desires only for the sake of some resulting good which he will obtain for himself. He *intends* the attainment of this ulterior object no less than [sic] he *intends* the wrongful act itself. His *intent*, therefore, is twofold, and is divisible into two distinct portions, which we may distinguish as his *immediate* and his *ulterior intent*. The former relates to the wrongful act itself; the latter is that which passes beyond the wrongful act, and relates to the object or series of objects for the sake of which the act is done. The ulterior intent is called the motive of the act.

Hitchler, *Motive As an Essential Element of Crime*, 35 DICK. L. REV. 105, 108 (1931); *see* Cook, *supra* note 15, at 660-61.

17. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

18. 29 U.S.C. § 158(a)(3) (1982).

the goal of encouraging or discouraging union membership).¹⁹ Predictably, cases in which an employer fired an employee without firing other employees, both for the object of discouraging union membership and for another, legitimate object, became known as "dual motive" or "mixed motive" cases.²⁰ The analogy, and the borrowed alliterative terminology, was impossible to resist in Title VII cases involving an intent to discriminate on race or sex grounds as well as an intent to select employees to maximize productivity. Hence the prevailing term is now "mixed motive," though it might as well be "mixed intent."²¹

A mixture of intents or motives in a case will always create a doubt whether the adverse action that caused the harm would have occurred anyway. Not only is it possible that a legitimate motive might have been more important than the wrongful one in the mind of the person making the decision, but it is also possible that, had the wrongful motive not loomed as large as it did, the legitimate one would have expanded in importance to occupy its position. For example, even though a person who refused to hire a black applicant might be a flagrant racist whose passions overwhelmed his residual, legitimate doubts about the applicant's abilities, it might still be true that without the passions, he might have denied her the job because of the residual doubts. The term "duplicative cause" fits mixed motive cases because two causes, either of which would alone cause the harm, operate simultaneously.²²

The United States Supreme Court first addressed mixed motive employment discrimination in 1977 in *Mount Healthy City School District Board of Education v. Doyle*.²³ In *Mount Healthy* a school board discharged a teacher

19. Christensen & Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 YALE L.J. 1269, 1271 (1968).

20. Even in the labor law cases, the terms "motive" and "intent" have been used so loosely that there is no longer any practical distinction between them. *Id.* at 1271 n.4.

21. Dean Welch contends that a clarification of motive and intent is desirable, and that disparate treatment cases should require a showing only of motive and not of intent. Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather Than Intent*, 60 S. CAL. L. REV. 733, 735 (1987). See generally Christensen & Svanoe, *supra* note 19, at 1273-1314 (tracing the proof of intent requirement for some violations of the National Labor Relations Act from its origin as a permissible use of apparent motive to infer intent). These matters are beyond the scope of this Article.

22. See Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1775-76 (1985). Closely related to mixed motive cases are hypothetical alternative cause cases. A hypothetical alternative cause case is one in which the motives are not mixed in the discriminator's decision to take adverse action against the protected individual. The wrongful motive is the only one driving the decision. Nevertheless, the evidence in the case demonstrates that the adverse action—the failure to hire or the discharge—would have occurred anyway. See, e.g., *Edwards v. Jewish Hosp.*, 855 F.2d 1345 (8th Cir. 1988). In *Edwards* a black man sued a hospital under 42 U.S.C. § 1981 (1982) for discrimination in discharging him from his job as a security guard after he failed a lie detector test regarding a theft at the hospital. *Id.* at 1347. The jury found that race was a substantial and motivating factor in the hospital's decision. *Id.* at 1348. Several white security guards also failed the test but were not discharged. Moreover, the whites all were on duty when the theft occurred, but the black employee was on leave. *Id.* But the jury also found that the hospital would have discharged the black employee even if race had not been a substantial and motivating factor, apparently because he created a disturbance and acted in a threatening fashion on another occasion. *Id.* at 1348.

Some commentators use the term "preemptive causation" to describe hypothetical alternative cause cases. See Wright, *supra*, at 1794-98. The wrongful conduct does induce the harm, but another cause is waiting in the wings to preempt its effects. A full discussion of these cases is beyond the scope of this Article.

23. 429 U.S. 274 (1977).

both because of protected speech and because of apparently genuine misconduct.²⁴ The Supreme Court stated that if the employer "would have reached that decision had not the constitutionally protected incident . . . occurred," the decision against renewing employment would not "necessarily amount to a constitutional violation justifying remedial action."²⁵

II. *PRICE WATERHOUSE V. HOPKINS* APPROACH TO MIXED MOTIVE DISCRIMINATION

In *Price Waterhouse v. Hopkins*²⁶ a woman associate sued an accounting firm for sex discrimination in its decision to deny her a promotion to partner.²⁷ A significant, motivating factor in the partnership decision was stereotyped thinking about the plaintiff's need for a "course at charm school," her "overcompensat[ion] for being a woman," and the importance that she "walk more femininely,"²⁸ despite her extraordinary ability to generate new business for the firm and the fact that she billed more hours than any other partnership candidate.²⁹ But another factor was her harsh treatment of staff,³⁰ a legitimate ground on which to deny her the promotion. The district court found that the accounting firm refused to promote the plaintiff for both discriminatory and legitimate, nondiscriminatory reasons.³¹ The district court held the defendant liable but declined to order back pay and reinstatement. The United States Court of Appeals for the District of Columbia Circuit affirmed the district court's decision on liability and reversed on relief.³²

The Supreme Court's plurality opinion, written by Justice Brennan and joined by Justices Blackmun, Marshall and Stevens, announced the Court's decision to reverse the court of appeals.³³ The Court found no clear error in the district court's factual conclusion that Price Waterhouse applied sex stereotypes in refusing to promote the plaintiff.³⁴ It held that the court of appeals had been correct in placing on the employer the burden of proof to establish that it would have made the same decision in the absence of sex stereotyping.³⁵ Nevertheless, the Court reversed and remanded for further proceedings because the court of

24. The teacher had protested the school's dress code policy on a radio broadcast. The teacher also had been involved in an altercation in the school cafeteria. *Id.* at 281-83.

25. *Id.* at 285. The Court's peculiar phrasing left unclear whether it believed that no liability attaches to the employer's conduct, or whether it believed that no remedy is appropriate under the circumstances. See *infra* text accompanying note 212.

26. 109 S. Ct. 1775 (1989).

27. See *id.* at 1781.

28. *Id.* at 1782.

29. *Hopkins v. Price Waterhouse*, 825 F.2d 458, 462 (D.C. Cir. 1987), *rev'd*, 109 S. Ct. 1775 (1989).

30. *Price Waterhouse*, 109 S. Ct. at 1782.

31. *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1114-19 (D.D.C. 1985), *aff'd in part, rev'd in part*, 825 F.2d 458 (D.C. Cir. 1987), *rev'd*, 109 S. Ct. 1775 (1989).

32. *Hopkins v. Price Waterhouse*, 825 F.2d 458, 473 (D.C. Cir. 1987), *rev'd*, 109 S. Ct. 1775 (1989).

33. *Price Waterhouse*, 109 S. Ct. at 1795.

34. *Id.* at 1793-94.

35. *Id.* at 1787.

appeals had incorrectly imposed a clear and convincing evidence standard on Price Waterhouse's contention that it would have made the decision for legitimate reasons.³⁶ The Court held that the correct standard was the preponderance of the evidence.³⁷ The plurality commented that the employer should satisfy its burden with objective evidence.³⁸

Justice White concurred in the judgment.³⁹ He limited the scope of the holding by rejecting the plurality's statement that the employer should produce objective evidence to satisfy its burden.⁴⁰ Justice O'Connor wrote a separate opinion concurring in the judgment.⁴¹ Justice Kennedy dissented, joined by Chief Justice Rehnquist and Justice Scalia.⁴²

The plurality began by considering the multiple causation found in a mixed motive case. "But-for causation" is a concept familiar to lawyers. To tell whether one event is the cause of another, the court asks whether the event would have happened in the absence of the cause.⁴³ The plurality, however, distinguished Title VII's causation standard from the "hypothetical construct" of but-for causation.⁴⁴ It said that Title VII focuses on whether gender (or race or religion) "was a factor in the employment decision *at the moment it was made*."⁴⁵ In a mixed motive discrimination case, a but-for test would ask whether, if the factor had been absent, the employer would have made same decision anyway.⁴⁶ Such a test might make sense in a case involving pretext, in which there is a single (either discriminatory or legitimate) cause of the adverse action.⁴⁷ But in a multiple causation situation, be it one of mixed motivations or combining physical forces, a pure but-for test yields the absurd conclusion that events can have no (but-for) causes at all.⁴⁸ The plurality noted that Congress rejected an amendment to Title VII that would have put "solely" before "because of such individual's . . . sex."⁴⁹ It also argued that Congress recognized mixed motivation by permitting race or sex preference if race or sex is a bona fide occupational qualification for a job, as well as by proscribing indirect, disparate impact discrimination.⁵⁰

36. *Id.* at 1793.

37. *Id.*

38. *Id.* at 1791.

39. *Id.* at 1795 (White, J., concurring).

40. *Id.* at 1796 (White, J., concurring).

41. *Id.* at 1796 (O'Connor, J., concurring).

42. *Id.* at 1806 (Kennedy, J., dissenting).

43. W. PROSSER & W. KEETON, PROSSER & KEETON ON THE LAW OF TORTS 265 (5th ed. 1984).

44. *Price Waterhouse*, 109 S. Ct. at 1785.

45. *Id.* (emphasis in original). The opinion emphasized "the present, active tense of the operative verbs of § 703(a)(1) [of Title VII] ('to fail or refuse')." *Id.*

46. *Id.*

47. *See id.* at 1785 n.6.

48. *Id.* at 1786. The opinion gave the example of two physical forces moving an object when either acting alone would have moved it. The but-for test would imply that neither force was a cause of the movement, because but for either, the object still would have moved. As Justice Brennan stated, it cannot be true that events that are "causally overdetermined" have no cause at all. *Id.*

49. *Id.* at 1785 & n.7.

50. *Id.* at 1786.

Nevertheless, the plurality rejected the idea that an employer violates Title VII whenever an employee's sex plays a motivating part in an employer's adverse decision. Under that approach, the question whether the decision would have been the same absent the illegal motive would be solely a matter of remedy. Justice Brennan stated that Title VII preserved management prerogatives to insist that employees meet job qualifications.⁵¹ Moreover, he said that Title VII's provision restricting the award of reinstatement and back pay to those who suffered adverse action "for any reason other than discrimination"⁵² was not an affirmative requirement that the court find liability and impose relief other than reinstatement when the defendant discriminates but the plaintiff suffers adverse action for both discriminatory and legitimate reasons.⁵³

The plurality justified shifting the burden of proof to the employer by drawing analogies to other situations in which, when an employer uses a forbidden criterion, it suffers the burden of proving that the outcome would have been the same if it had not used the criterion.⁵⁴ The opinion cited cases on the bona fide occupational qualification exception to Title VII,⁵⁵ the Equal Pay Act's proviso permitting disparate pay as a result of a "factor other than sex,"⁵⁶ and the Pregnancy Discrimination Act's stipulation that necessary limits on work may be imposed.⁵⁷ It gave special prominence to *Mount Healthy City School District Board of Education v. Doyle*,⁵⁸ in which the Court ruled that once an employee shows that constitutionally protected speech was a motivating factor in the em-

51. *Id.* at 1786-87.

52. 42 U.S.C. § 2000e-5(g) (1982).

53. *Price Waterhouse*, 109 S. Ct. at 1787 n.10. Justice Brennan went on to note that prior decisions "suggest that the proper focus of § 706(g) is on claims of systematic discrimination, not on charges of individual discrimination." *Id.* See generally *infra* text accompanying notes 308-15 (discussing section 706(g) in the context of the approach to mixed motive and hypothetical alternative cause discrimination advanced in this Article).

54. *Price Waterhouse*, 109 S. Ct. at 1789-90. The plurality distinguished Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). *Burdine* held that the burden of producing evidence, but not the burden of persuasion, shifts in a disparate treatment case. *Burdine*, 450 U.S. at 253-54. For example, in a sex discrimination case the plaintiff must show that she is qualified for a position and either (1) was not hired and the employer continued to accept applications, or (2) was replaced by a male with equal or lesser qualifications. *Id.* at 253-54 n.6. The employer then must present evidence of a legitimate business reason for its conduct, at which point the plaintiff can show that the reason is pretextual. See *id.* at 256-58. The *Price Waterhouse* plurality found *Burdine* irrelevant. It said that the plaintiff in a mixed motive case need not "squeeze her proof into *Burdine*'s framework. Where a decision was the product of a mixture of legitimate and illegitimate motives, . . . it simply makes no sense to ask whether the legitimate reason was 'the true reason' (Brief for Petitioner 20 (emphasis added) for the decision—which is the question asked by *Burdine*." *Price Waterhouse*, 109 S. Ct. at 1788-89 (emphasis and citation in original). The Court then cited precedent in which courts shifted the burden of persuasion to the defendant. It did not further consider whether *Burdine* might apply by analogy, and thus call merely for a shift of the burden of production in the mixed motive situation. *Id.* at 1789. Even though *Burdine* did not receive such extended treatment, the analogies chosen by the plurality, in which the burden of persuasion does shift, appear closer than *Burdine*. See *infra* text accompanying notes 55-57. This Article suggests an approach that renders irrelevant the entire question of what the employer would have done in the absence of discrimination.

55. *Dothard v. Rawlinson*, 433 U.S. 321, 332-37 (1977) (construing 42 U.S.C. § 2000e-2(e) (1982)).

56. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974) (construing 29 U.S.C. § 206(d)(1) (1982)).

57. *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543, 1548 (11th Cir. 1984); *Wright v. Olin Corp.*, 697 F.2d 1172, 1187 (4th Cir. 1982) (construing 42 U.S.C. § 2000e-5(f)(1) (1982)).

58. 429 U.S. 274 (1977).

ployer's decision, the employer has to prove "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct."⁵⁹ It also quoted *NLRB v. Transportation Management Corp.*,⁶⁰ which shifted the burden of proof to the employer in cases involving the National Labor Relations Act's prohibition of affirmative relief for discrimination against a union member if the member is discharged for cause.⁶¹ As in the Title VII context, "[t]he employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk"⁶² The opinion said that in most cases, the employer would need to prove by objective evidence that its legitimate motives would have caused it to make the same decision.⁶³

The plurality nevertheless rejected the court of appeals' holding that the burden of proof not only shifts, but also rises to the standard of clear and convincing evidence. It noted that "[c]onventional rules of civil litigation generally apply in Title VII cases"⁶⁴ and that an elevated standard of proof applies only in cases in which the government seeks to take away personal liberty and in a few other exotic situations.⁶⁵ It distinguished situations in which the higher standard applies to relief determinations on the ground that the test applies to liability.⁶⁶ The plurality again drew analogies to the most closely comparable cases, *Mount Healthy* and *Transportation Management*, each of which applied a preponderance of the evidence standard.⁶⁷

The plurality reaffirmed⁶⁸ that Title VII forbids employers to engage in sex stereotyping.⁶⁹ Although it stated that the evidence of sex stereotyping in *Price Waterhouse* was sufficient to establish the plaintiff's case and shift the burden of persuasion, the plurality declined to describe which facts, in general, would make such a case.⁷⁰ Justice Brennan did caution that workplace remarks based on sex stereotypes do not inevitably prove that the employee's sex played a part in an adverse employment decision, but stated that such remarks can be evidence that it did.⁷¹

In his concurrence, Justice White did not directly attack the plurality's rea-

59. *Id.* at 287.

60. 462 U.S. 393 (1983).

61. *Id.* at 403.

62. *Price Waterhouse*, 109 S. Ct. at 1790 (quoting *Transportation Management*, 462 U.S. at 403).

63. *Id.* at 1791. This comment appears to be the principal source of disagreement between the plurality and Justice White. See *id.* at 1795. See generally *infra* text accompanying notes 72-80 (discussing White concurrence).

64. *Price Waterhouse*, 109 S. Ct. at 1792.

65. *Id.*

66. *Id.*

67. *Id.* at 1792-93.

68. See *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978).

69. *Price Waterhouse*, 109 S. Ct. at 1791. Sex stereotyping is the evaluation of persons by assuming or insisting that they match the stereotype associated with their sex. See *id.*

70. *Id.*

71. *Id.*

soning, but suggested that much of it was unnecessary. He would have relied exclusively on the analogy to *Mount Healthy*,⁷² and would have avoided any "semantic discussions" of but-for causation.⁷³ Justice White specifically agreed with the plurality's distinction of *Burdine* and the other "pretext cases."⁷⁴ He also agreed with the plurality that the employer's burden in mixed motive cases goes to liability, not to remedy.⁷⁵ In describing his agreement with the result reached by the plurality, however, he worked what might be either a change in substance or merely in nuance:

[H]ere, as in *Mount Healthy*, and as the Court now holds, Hopkins was not required to prove that the illegitimate factor was the only, principal, or true reason for the petitioner's action. Rather, . . . her burden was to show that the unlawful motive was a *substantial* factor in the adverse employment action.⁷⁶

The emphasis on "substantial" might mean that he would apply the mixed motive framework to fewer cases than would the plurality, who, by avoiding the word "substantial," may have anticipated use of the framework whenever there is the slightest discriminatory taint to the decisionmaking process.⁷⁷ Neither Justice Brennan nor Justice White is explicit on the matter, however, and the facts of the case do not support any controversy, for there was no doubt that the discriminatory motive met the substantial factor test.⁷⁸

Justice White disagreed with the plurality's statement that ordinarily, when an employer denies discrimination but is found to have been motivated in part by it, the employer would need to submit objective evidence that the same decision would have been reached in the absence of discrimination.⁷⁹ Nevertheless,

72. *Id.* at 1795 (White, J., concurring).

73. *Id.* (White, J., concurring).

74. *Id.* at 1795-96 (White, J., concurring).

75. *Id.* at 1796 n.** (White, J., concurring).

76. *Id.* at 1795 (White, J., concurring) (emphasis in original).

77. The quoted passage contains a reference to the concurrence of Justice O'Connor. *Id.* (White, J., concurring). This reference may further support the interpretation advanced in the text. See *infra* text accompanying notes 81-92 (discussing O'Connor concurrence).

78. See *Price Waterhouse*, 109 S. Ct. at 1795 (White, J., concurring). The differences among the plurality opinion, the White concurrence, and the O'Connor concurrence raise doubts about the precedential effect of the case. Justice White endorses the result reached by the plurality and the basic elements of its reasoning, thus establishing a majority. Still, to the extent that his opinion might be thought to occupy a narrower ground than that of the plurality, it might be taken as authoritative. See *Marks v. United States*, 430 U.S. 188, 192-93 (1977). Justice O'Connor rejects the basics of the plurality's reasoning, although her approval of the result makes her opinion another candidate for authoritativeness as representative of a majority with a different narrower ground. The array of opinions thus suggests the possible existence of dual majorities, both of which may command authority. See Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 767-69 (1980); Comment, *Supreme Court No-Clear-Majority Decisions: A Study in Stare Decisis*, 24 U. CHI. L. REV. 99, 115-124 (1956). Nevertheless, because Justice O'Connor's opinion has so little in common with that of the plurality, it is difficult to create a working majority from it. Her disagreements with Justice White hamper the construction of a majority comprising Justice O'Connor, Justice White, and the dissenters. See *infra* text accompanying notes 81-92 (discussing O'Connor concurrence). This Article attempts to find the best approach to mixed motive discrimination. It criticizes all the opinions in *Price Waterhouse*, and it ultimately rejects those approaches in favor of a position that the Court did not even consider.

79. *Price Waterhouse*, 109 S. Ct. at 1796 (White, J., concurring). Justice White stated that the employer's own credible testimony that the legitimate reasons were present and that it would have

he made no response to the plurality's charge that his position that the employer, who has already been found lying, is in such a case due special credence, is "baffling."⁸⁰

In her concurrence, Justice O'Connor agreed that shifting the burden of proof is proper in the liability determination when "the employer has created uncertainty as to causation by knowingly giving substantial weight to an impermissible criterion."⁸¹ But her emphasis on the uncertainty of causation underscored her disagreement with the plurality's reasoning. She contended that Title VII requires but-for causation, but saw mixed motive cases as satisfying that test if—and only if—the employer would not have reached the same decision on legitimate grounds.⁸² For the plurality, there was nothing uncertain about the cause of the failure to promote: it was both the employer's sex stereotypes and the plaintiff's abrasiveness. Nevertheless, because of the management prerogatives protected by Title VII, there is no liability if the candidate would not have been promoted anyway. For Justice O'Connor, the causation question is not answered until one knows whether the candidate would have been promoted in the absence of illegal discrimination.⁸³ If there is causal uncertainty, she argued, then the employer, who created it, ought to bear the burden of resolving it. Management prerogatives, in Justice O'Connor's view, are irrelevant.⁸⁴

Justice O'Connor distinguished *Burdine*, which shifted only the burden of production, on the ground that the showing *Burdine* requires of the plaintiff is weaker than that in a case like *Price Waterhouse*.⁸⁵ In a mixed motive case, there is direct evidence of discriminatory intent.⁸⁶ This stronger evidence justi-

acted for those reasons alone "should be ample proof," especially "where the employer denies any illegitimate motive in the first place but the court finds that illegitimate, as well as legitimate, factors motivated the adverse action." *Id.* (White, J., concurring).

80. *Id.* at 1791 n.14 (plurality opinion).

81. *Id.* at 1796 (O'Connor, J., concurring).

82. *See id.* at 1797 (O'Connor, J., concurring) ("[A] substantive violation of the statute only occurs when consideration of an illegitimate criterion is the 'but-for' cause of an adverse employment action.").

83. *Id.* (O'Connor, J., concurring).

84. Another difference between Justice O'Connor's opinion and that of the plurality is that the O'Connor concurrence, in places, casually substituted the idea that the employer's decision would have been justified in the absence of discrimination for the idea that the decision would have been the same. *See id.* at 1799 (O'Connor, J., concurring) ("Moreover, placing the burden on the defendant in this case to prove that the same decision would have been justified by legitimate reasons . . ."); *id.* at 1800 (O'Connor, J., concurring) ("an evidentiary rule which places the burden of persuasion on the defendant to demonstrate that legitimate concerns would have justified an adverse employment action"). *But see id.* at 1799 (O'Connor, J., concurring) ("calling upon the employer to show that despite consideration of illegitimate factors the individual plaintiff would not have been hired or promoted in any event"). The concepts are far from equivalent, as Justice Brennan indicated in the plurality opinion. *Id.* at 1791 ("An employer may not . . . prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision."). *See generally supra* note 22 (discussing hypothetical alternative cause cases). But Justice O'Connor's inconsistency and the actual presence of two mixed motives in *Price Waterhouse* render her substitution of terms insignificant.

85. *Id.* at 1801 (O'Connor, J., concurring).

86. The prima facie case established [in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)] was not difficult to prove, and was based only on the statistical probability that when a number of potential causes for an employment decision are eliminated an inference arises that an illegitimate factor was in fact the motivation behind the decision. In the face of this inferential proof, the employer's burden was deemed to be only one of production;

fies shifting the burden of persuasion.⁸⁷ She further noted that the employer has superior access to evidence of its own intent, which justifies shifting the burden.⁸⁸ Apparently anticipating the Court's rejection of a shift in the burden of persuasion in disparate impact cases relying solely on statistical evidence,⁸⁹ she went on to stress that Title VII supports stronger measures against explicit consideration of race and other forbidden criteria, "the most obvious evil Congress had in mind when it enacted Title VII."⁹⁰

Justice O'Connor would have placed some restrictions on the type of showing that triggers the shift of the burden of persuasion in a mixed motive case, requiring direct evidence that an illegal criterion was a substantial factor.⁹¹ "[S]tray remarks in the workplace" do not suffice, nor do statements of those other than the decision makers, nor does even expert opinion, standing alone.⁹²

In dissent, Justice Kennedy endorsed Justice O'Connor's approach to but-for causation⁹³ and attacked the plurality for "inconsistency."⁹⁴ He argued that it is inconsistent to say that discrimination, with other factors, caused the decision, but the employer nevertheless avoids liability if it shows the decision would have come out the same way in the absence of discrimination.⁹⁵ The plurality's position, according to Justice Kennedy, conflicts with the language of Title VII, which establishes liability whenever an employer makes decisions "because of" a forbidden criterion.⁹⁶

The dissent further argued that the entire issue of liability should be analyzed under the framework of *Texas Department of Community Affairs v. Burdine*,⁹⁷ which would entail a mere shift in the burden of producing evidence, not a shift in the burden of persuasion.⁹⁸ The dissent noted that in a previous case involving explicit racial remarks by the employer, the Court had used the *Bur-*

the employer must articulate a legitimate reason for the adverse employment action. . . . I do not think that the employer is entitled to the same presumption of good faith where there is direct evidence that it has placed substantial reliance on factors whose consideration is forbidden by Title VII.

Id. at 1801 (O'Connor, J., concurring) (citations omitted). Justice O'Connor noted that the only Supreme Court case to apply the *Burdine* framework in the face of direct evidence of discrimination was *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983), in which the parties never argued for any different consideration. In contrast, the Court found *Burdine* inapplicable in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), a case involving direct evidence of discrimination brought under the Age Discrimination in Employment Act.

87. *Price Waterhouse*, 109 S. Ct. at 1801 (O'Connor, J., concurring).

88. *Id.* at 1802 (O'Connor, J., concurring).

89. *See Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989).

90. *Price Waterhouse*, 109 S. Ct. at 1803 (O'Connor, J., concurring) (quoting *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)).

91. *Id.* at 1804 (O'Connor, J., concurring).

92. *Id.* at 1804-05 (O'Connor, J., concurring). Justice O'Connor, contrary to Justice Brennan, *id.* at 1790 n.13 (plurality opinion), saw a great difference between the factual threshold she proposed and that of the plurality, and she cited the concurrence by Justice White as supporting her position. *Id.* at 1805 (O'Connor, J., concurring).

93. *Id.* at 1807 (Kennedy, J., dissenting).

94. *Id.* at 1808 (Kennedy, J., dissenting).

95. *Id.* at 1809 (Kennedy, J., dissenting).

96. *Id.* (Kennedy, J., dissenting).

97. 450 U.S. 248 (1981).

98. *Price Waterhouse*, 109 S. Ct. at 1809-10 (Kennedy, J., dissenting).

dine framework.⁹⁹ Justice Kennedy contended that the plurality should not have relied on bona fide occupational qualification and pregnancy accommodation analogies, because in such cases sex is admittedly the but-for cause of the employment decision.¹⁰⁰ He conceded that *Mount Healthy* and *Transportation Management* were "[c]loser analogies," but found no reason to prefer them over *United States Postal Service Board of Governors v. Aikens*¹⁰¹ and *Burdine*. He also found unpersuasive Justice O'Connor's analogies to tort cases in which the defendant's creation of causal uncertainty justifies shifting the burden of proof.¹⁰² He foresaw benefits to few plaintiffs from the new framework and a likelihood of confusion as lower courts determine which cases call for a shift in the burden, particularly if the test is applied in jury trials of cases brought under the Age Discrimination in Employment Act and the Civil Rights Act of 1866.¹⁰³ He also foresaw problems with suits challenging affirmative action plans, a topic the plurality said it was not considering at this time.¹⁰⁴

Turning to the merits of Ms. Hopkins's own claim, Justice Kennedy stated that sex stereotyping is not an independent cause of action under Title VII, but only evidence of discriminatory intent.¹⁰⁵ He said the record was strong enough that had the district court found sex discrimination to have caused the adverse action, it would probably not have committed reversible error.¹⁰⁶ But because the district court found neither that the proffered legitimate reason was pretextual nor that Hopkins would have been promoted in the absence of discrimination, Justice Kennedy would have remanded for entry of judgment in favor of Price Waterhouse.¹⁰⁷

III. COMMON-LAW APPROACHES TO MIXED MOTIVE CASES

Discrimination cases are hardly unique in their propensity to yield situations in which violations of the law partially cause events that would have occurred even without the illegal cause. Both tort and contract cases frequently present such fact patterns. But unlike a discrimination case decided under the reasoning of any of the opinions in *Price Waterhouse*, the tort and contract cases are not dismissed for want of causation. Instead, in these fact patterns closely analogous to mixed motive discrimination cases, courts impose liability and award full damages and other relief.

The first few examples are from fields of activity in which conduct driven by bad motives is tortious, but the same conduct driven by other motives is either privileged or otherwise not subject to tort liability. In any of those fields, a

99. *Id.* at 1803 (Kennedy, J., dissenting) (citing *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983)).

100. *Id.* at 1811 (Kennedy, J., dissenting).

101. 460 U.S. 711 (1983).

102. *Id.* (Kennedy, J., dissenting).

103. *Id.* at 1812-13 (Kennedy, J., dissenting).

104. *Id.* at 1813 n.4 (Kennedy, J., dissenting).

105. *Id.* at 1813 (Kennedy, J., dissenting).

106. *Id.* at 1814 (Kennedy, J., dissenting).

107. *Id.* (Kennedy, J., dissenting).

defendant may act partly because of a bad motive and partly because of a privileged or neutral one. The question the common law asks before finding liability and awarding remedies is not whether the defendant would have acted the same way if the bad motive were absent, but whether the bad motive was dominant over other motives. In still other cases in which two forces combine to cause loss, courts apply similar principles in awarding full liability against persons whose negligent acts or breaches of contract were one of the forces.

A. *Intentional Interference with Contractual Relations*

The defendant's motivation determines the existence of liability for inducing a breach of contract. A defendant who acts out of whim, spite, or pleasure in another's ruin may be liable for interference with contractual relations.¹⁰⁸ On the other hand, if the defendant acts reasonably to protect its own economic interests, the interference may be privileged.¹⁰⁹ If the defendant acts out of a mixture of bad and privileged motives, courts weigh the motives to find out which is the dominant cause of the defendant's conduct.¹¹⁰

An Alaska case, *Alyeska Pipeline Service Co. v. Aurora Air Service, Inc.*,¹¹¹ exemplifies the dominant motive standard. Acting within an existing contract with a buyer, Alyeska took over transportation services that Aurora had been supplying. That action caused the buyer to terminate its contract with Aurora. Alyeska said it had an absolute right to take over the services under its contract; Aurora said that there was no privilege to act unreasonably. The court adopted the dominant motive test, which had been suggested by Dean Prosser.¹¹² The court then looked at the competing allegations of motive. Alyeska said it had economic and safety concerns; Aurora said the motive was simple ill will. The court said that on the evidence the jury reasonably could have found that the

108. 2 F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* § 6.11, at 347 (2d ed. 1986).

109. *Id.* at 347-48.

110. W. PROSSER & W. KEETON, *supra* note 43, § 129, at 984. The *Restatement* appears to exhibit some confusion distinguishing between motive and intent. See *RESTATEMENT (SECOND) OF TORTS* § 766 comment j (1977). It speaks of situations in which the defendant has a "purpose" or "desire" to do something else but through intentional conduct knowingly interferes with the contractual relations of the plaintiff. This incidental interference is a tort if unreasonable in its grave harm to plaintiff's interests and slight benefit to defendant's. *Id.* Thus, according to the *Restatement*, there may be liability if the desire to interfere is "only a casual motive." *Id.* § 767 comment d.

According to standard legal usage, a person's desire to undertake some immediate activity is an intention rather than a motive. Motive is instead the underlying goal or inducement. See generally *supra* note 16 and accompanying text (describing distinction). The *Restatement's* ideas about casual or incidental interference as opposed to interference with the "motive" (properly, the intention) to interfere correspond to Schnapper's two categories of intention in discrimination cases. See Schnapper, *supra* note 15, at 32. To the extent that the *Restatement* does address itself to mixed motive, it establishes liability where Dean Prosser's dominant motive test is met, although it appears also to opt for liability in some cases where the motive exists but is not dominant. See *RESTATEMENT (SECOND) OF TORTS*, § 766 comment j, at 12 (1977) ("The rule stated in this Section is applied if the actor acts for the primary purpose of interfering with the performance of the contract, and also if he desires to interfere, even though he acts for some other purpose in addition."); see also *id.* comment r, at 16 ("[T]he freedom to act . . . may depend in large measure on the purposes of [the actor's] conduct. . . . The presence or absence of ill will . . . may clarify the purposes of the actor's conduct.").

111. 604 P.2d 1090 (Alaska 1979).

112. *Id.* at 1093.

motive was ill will.¹¹³ Subsequent cases have applied the test to situations in which the motives have been more mixed.¹¹⁴

B. Defamation and Malicious Prosecution

A defendant may be privileged to publish otherwise defamatory statements if its motive is to protect a privileged interest.¹¹⁵ On the other hand, if spite or ill will motivates the defendant, the privilege is lost. If the motives are mixed, the law looks to the "primary motive" in imposing or withholding liability.¹¹⁶ In *Nodar v. Galbreath*,¹¹⁷ the Florida Supreme Court reversed a judgment for a teacher against a parent who asserted a privilege of parental interest.¹¹⁸ It acknowledged the evidence of some ill will, but declared: "The incidental gratification of personal feelings of indignation is not sufficient to defeat the privilege where the primary motivation is within the scope of the privilege."¹¹⁹ Other cases adopt the same approach.¹²⁰ Courts apply similar principles in malicious prosecution cases.¹²¹

113. *Id.* at 1094. The adoption of the test may have been dicta, for neither party contended that Alyeska's motives actually were mixed. Aurora said Alyeska's allegation of safety and monetary concerns was a facade. *Id.* The dominant motive test itself does not relate to pretext, although it clearly negates the idea of absolute privilege. Prosser's formulation, quoted by the court, is that any privilege is lost when the dominant motive is one of ill will; thus in a mixed motive case the trier should look to whether the dominant motive is the one that is privileged:

[T]here has been general agreement that a purely "malicious" motive, in the sense of spite and a desire to do harm to the plaintiff for its own sake, will make the defendant liable for interference with a contract. The same is true of mere officious intermeddling for no other reason than a desire to interfere. On the other hand, in the few cases in which the question has arisen, it has been held that where the defendant has a proper purpose in view, the addition of ill will toward the plaintiff will not defeat his privilege. It may be suggested that here, as in the case of mixed motives in the exercise of a privilege in defamation and malicious prosecution, the court may well look to the predominant purpose underlying the defendant's conduct.

W. PROSSER & W. KEETON, *supra* note 43, at 984 (footnotes omitted).

114. Some cases have relied on *Alyeska*. *E.g.*, *Ollice v. Alyeska Pipeline Serv. Co.*, 659 P.2d 1182 (Alaska 1983); *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293 (Utah 1982). Other cases have applied the test without relying on *Alyeska*. *E.g.*, *Hamro v. Shell Oil Co.*, 674 F.2d 784 (9th Cir. 1982); *Lowell v. Mother's Cake & Cookie Co.*, 79 Cal. App. 3d 13, 144 Cal. Rptr. 664 (1978).

115. W. PROSSER & W. KEETON, *supra* note 43, § 115, at 824-25.

116. 2 F. HARPER, F. JAMES & O. GRAY, *supra* note 108, § 5.27, at 234; W. PROSSER & W. KEETON, *supra* note 43, § 115, at 834. As with intentional interference, the *Restatement's* approach is slightly less clear. See RESTATEMENT (SECOND) OF TORTS § 603 comment a (1976) (publication solely out of spite or ill will not privileged; publication privileged when defendant was motivated by privileged interest but publication was nevertheless "inspired in part by resentment or indignation").

117. 462 So. 2d 803 (Fla. 1984).

118. *Id.* at 812.

119. *Id.* at 811-12.

120. *Biggins v. Hanson*, 252 Cal. App. 2d 16, 59 Cal. Rptr. 897 (1967); *Price v. Conoco, Inc.*, 748 P.2d 349 (Colo. App. 1987); *Alford v. Georgia Pac. Corp.*, 331 So. 2d 558 (La. App. 1976); *Schafroth v. Baker*, 276 Or. 39, 553 P.2d 1046 (1976).

121. *E.g.*, *Nesmith v. Alford*, 318 F.2d 110 (5th Cir. 1963), *cert. denied*, 375 U.S. 975 (1964); *Northwest Fla. Home Health Agency v. Merrill*, 469 So. 2d 893 (Fla. App. 1985); see 1 F. HARPER, F. JAMES & O. GRAY, *supra* note 108, § 4.6, at 443-44; W. PROSSER & W. KEETON, *supra* note 43, § 119, at 883. The *Restatement* states the test precisely: "To subject a person to liability for malicious prosecution, the proceedings must have been initiated primarily for a purpose other than that of bringing an offender to justice." RESTATEMENT (SECOND) OF TORTS § 668, at 438 (1976). The court is to balance the motives to see which is dominant:

The phrase "primarily for a purpose other than that of bringing an offender to justice"

C. Retaliatory Eviction

A tenant may defeat an eviction action brought in retaliation against his efforts to enforce a housing code. Retaliation is both a defense and a cause of action for damages.¹²² Like mixed motive cases, retaliatory eviction defenses or claims turn on proof of motivations that frequently are mixed. Although states vary on the degree of retaliatory motivation needed to support the defense or claim, the leading standard is that of dominant motive.¹²³ Some states sustain the defense when the eviction was motivated even in the slightest part by retaliation.¹²⁴

D. Concurrent Causation in Unintentional Torts

In many situations, two events occur concurrently and cause an injury, but either one, acting alone, would have caused the same injury. Without either event, the injury would have happened anyway. Nevertheless, leaving the victim without a remedy in those circumstances seems preposterous. Hence tort law imposes joint and several liability and awards complete recovery from both causal agents.¹²⁵ The classic example is *Corey v. Havener*,¹²⁶ in which two motorcycles simultaneously passed too close to a horse, which bolted and

denotes that the person initiating or procuring the criminal proceeding was motivated by some other purpose that played a more important part in influencing his decision than the motive of bringing an offender to justice. When there is evidence that the latter motive played a substantial part in influencing his decision, the determination of whether the ulterior purpose was the primary one is normally for the jury.

Id. comment c, at 439.

122. See *Aweeka v. Bonds*, 20 Cal. App. 3d 278, 97 Cal. Rptr. 650 (1971) (cause of action); *Morford v. Lensey Corp.*, 110 Ill. App. 3d 792, 442 N.E.2d 933 (1982) (same).

123. RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT § 14.8, at 49-50 (1976) ("[T]he landlord is primarily motivated in so acting because the tenant" undertook enforcement.). Three states have codified the primary motivation standard. MICH. COMP. LAWS ANN. § 600.5720 (West 1987) ("primarily as a penalty"); N.C. GEN. STAT. § 42-37.1(b) (1988); WASH. REV. CODE ANN. § 59.18.240 (West 1988). See generally R. Schoshinski, AMERICAN LAW OF LANDLORD AND TENANT § 12.11, at 742 (1980) (discussing statutes). Others have adopted it by common law. *Windward Partners v. Delos Santos*, 577 P.2d 326 (Hawaii 1978); see *Robinson v. Diamond Hous. Corp.*, 463 F.2d 853 (D.C. Cir. 1972).

124. E.g., MINN. STAT. ANN. § 566.03 (West 1987) ("intended in whole or in part as a penalty"); see *Parkin v. Fitzgerald*, 307 Minn. 423, 240 N.W.2d 828 (1976); *Silberg v. Lipscomb*, 117 N.J. Super. 491, 285 A.2d 86 (1971). Even the few states that require proof of "sole purpose," *Dickhut v. Norton*, 45 Wis. 2d 389, 173 N.W.2d 297 (1970); see *Groton Townhouse Apts. v. Covington*, 38 Conn. Supp. 370, 448 A.2d 221 (Conn. Super. Ct. 1982) (construing predecessor of CONN. GEN. STAT. ANN. § 47a-33 (West Supp. 1988)); *Green v. Housing Auth.*, 164 Ga. App. 205, 296 S.E.2d 758 (1982); *Real Estate Servs. v. Barnes*, 451 So. 2d 1229 (La. App. 1984), do not go beyond that standard to ask whether, if the motive had not been present, another motive would have appeared that would have led the landlord to evict anyway. The only state that comes close to using this approach is Massachusetts, where the statute creates a rebuttable presumption that the landlord's eviction is a reprisal for the tenant's filing for or obtaining of legal relief from the landlord's housing code violation, if the eviction occurs within six months of the tenant's action. The presumption is rebutted only by clear and convincing evidence that the landlord had "sufficient independent justification for taking such action, and would have in fact taken such action, in the same manner and at the same time the action was taken," regardless of the tenant's action. MASS. GEN. LAWS ANN. ch. 186, § 17 (West Supp. 1988). This hypothetical "what would have happened if the motive had not been present" is the avenue of escape under present mixed motive discrimination doctrine.

125. Restricted to the question of causation alone, and regarded merely as a rule of exclusion, the "but for" rule serves to explain the greater number of cases; but there is one type of situation in which it fails. If two causes concur to bring about an event, and either one

harmed the plaintiff. The drivers were held jointly and severally liable, though each acted independently.¹²⁷ Similar cases abound.¹²⁸ Each tortfeasor is liable for the entirety of the damage, even if the two did not act in concert, despite the fact that if either had been absent the same harm would have occurred.¹²⁹

More significant than the concurrent tortfeasor cases, in which the escape of both defendants seems too obviously unfair, are cases in which an individual's actions are concurrent with a chance event that independently would have caused the injury. Even in the latter situation, tort law forces the person committing the wrong to remedy the entire loss.¹³⁰ Thus, when a fire set by the defendant combines with a fire of unknown origin to damage plaintiff's property, and either would have been sufficient to do the damage by itself, the defendant is liable for the whole damage.¹³¹ Similarly, when a doctor negligently treats an ingrown toenail but the patient also suffers from arteriosclerosis, and gangrene develops, requiring amputation of the patient's foot, the doctor is liable as long as the negligent treatment was a substantial factor in producing the gangrene.¹³² It does not matter that the arteriosclerosis alone would have required the amputation.¹³³ And when the victim of an industrial accident receives an injury likely to result in death, but just before he dies, his wife, who is immune from suit, mistakenly feeds him a poison that would kill a person who was well, the company responsible for the accident is fully liable for the death.¹³⁴

of them, operating alone, would have been sufficient to cause the identical result, some other test is needed.

W. PROSSER & W. KEETON, *supra* note 43, § 41, at 266-67.

126. 182 Mass. 250, 65 N.E. 69 (1902).

127. *Id.* at 252, 65 N.E. at 69.

128. *E.g.*, Rozark Farms, Inc. v. Ozark Border Elec. Coop., 849 F.2d 306 (8th Cir. 1988); Glick v. Ballentine Produce, Inc., 396 S.W.2d 609 (Mo. 1965), *appeal dismissed*, 385 U.S. 5 (1966); Town of Sentinel v. Riley, 171 Okla. 533, 43 P.2d 742 (1935); Landers v. East Tex. Salt Water Disposal Co., 151 Tex. 251, 248 S.W.2d 731 (1952); Johnson v. Chapman, 43 W. Va. 639, 28 S.E. 744 (1897); see W. PROSSER & W. KEETON, *supra* note 43, § 41, at 266-67 (citing additional similar cases).

129. Glick, 396 S.W.2d at 612-13; see Chiles v. Rohl, 47 S.D. 580, 201 N.W. 154 (1924). In Tidal Oil Co. v. Pease, 153 Okla. 137, 5 P.2d 389 (1931), the court permitted recovery for loss of cattle that had drunk from two streams. The defendants, acting independently, had polluted the streams, but no evidence revealed from which stream the cattle drank or whether the pollution of any one defendant was enough to have killed the cattle.

130. If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about. RESTATEMENT (SECOND) OF TORTS § 432(2), at 430 (1965).

The statement in Subsection (2) applies not only when the second force which is operating simultaneously with the force set in motion by the defendant's negligence is generated by the negligent conduct of a third person, but also when it is generated by an innocent act of a third person or when its origin is unknown.

Id. § 432 comment d, at 431; see Carpenter, *Concurrent Causation*, 83 U. PA. L. REV. 941, 951 (1935). Although the *Restatement* phrases its provision in terms of negligence, the same principle applies to intentional torts. RESTATEMENT (SECOND) OF TORTS § 870 comment 1, at 286 (1979).

131. Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry., 146 Minn. 430, 436, 179 N.W. 45, 48-49 (1920); Kingston v. Chicago & N.W. Ry., 191 Wis. 610, 612, 211 N.W. 913, 914 (1927); RESTATEMENT (SECOND) OF TORTS § 432 comment d, illustration 4 (1965) (second fire set by stroke of lightning or of unknown origin).

132. Kyriss v. State, 707 P.2d 5, 7-8 (Mont. 1985).

133. *Id.* at 8.

134. Thompson v. Louisville & Nashville R.R., 91 Ala. 496, 499, 8 So. 406, 407 (1890).

In cases in which the harm is not strictly concurrent, courts also award full relief, despite the fact that the damage would have occurred without the tortious act.¹³⁵ For example, in *Baker v. Willoughby*¹³⁶ the defendant negligently injured the plaintiff's ankle, causing him some disability. Several years later, but before the case came to trial, two men shot the plaintiff, forcing doctors to amputate the disabled leg. The House of Lords ruled that the second injury did not diminish the damages for which the defendant was liable.¹³⁷

Courts justify those decisions on both theoretical and pragmatic grounds. They emphasize that the wrongdoer actually caused the harm, and so ought to be liable no matter what any other factors might have done in the wrongdoer's absence.¹³⁸ They also emphasize the policy of affording compensation to the victim, reasoning that between the innocent victim and the wrongdoer whose conduct was a concurring cause of the loss, the wrongdoer should bear the loss.¹³⁹ Like the courts in the common-law mixed motive cases, they do not ask what hypothetically would have happened.¹⁴⁰ Unlike those courts, however, they do not require that the defendant who is found liable be responsible for the dominant cause; the conduct needs only to be a "substantial factor" in bringing about the harm.¹⁴¹

E. Concurrent Cause Contract Losses

Just as concurrent cause torts occur, so do concurrent cause breaches of contract. When both of the sources of raw materials for a product fail to deliver, each can state truthfully that the loss would have occurred in the absence of its individual breach. Courts have responded by holding both of the entities breaching the contract jointly and severally liable for the whole damage.¹⁴² The results in those concurrent cause breach of contract cases thus parallel concurrent cause tort cases,¹⁴³ and employ identical reasoning. As a matter of policy, it is absurd to deny the plaintiff a remedy because two or more individuals are guilty of wrongs that have concurrently caused the same harm.¹⁴⁴ Policy also justifies holding the defendant liable for the entirety of the harm when an inno-

135. *Harwood v. Wyken Colliery Co.*, 2 K.B. 158 (1913) (awarding full liability for disability from injury although subsequent heart disease imposed same limits on activity). *Contra* *Dillon v. Twin State Gas & Elec. Co.*, 85 N.H. 449, 163 A. 111 (1932) (discussed *infra* text accompanying note 250).

136. 1970 A.C. 467.

137. *Id.* at 492-93.

138. *Id.*; accord *Thompson*, 91 Ala. at 501, 8 So. at 408.

139. See *Kingston v. Chicago & N.W. Ry.*, 191 Wis. 610, 618, 211 N.W. 913, 915 (1927).

140. See *supra* text accompanying notes 108-24.

141. *Kyriss v. State*, 707 P.2d 5, 8 (Mont. 1985); RESTATEMENT (SECOND) OF TORTS § 430 comment d, at 428 (1965) ("In order that a negligent actor may be liable for harm resulting to another from his conduct, it . . . is not necessary that it be the cause, using the word 'the' as meaning the sole and even the predominant cause."); see *id.* § 432(2) & comment d.

142. *E.g.*, *Krauss v. Greenberg*, 137 F.2d 569, 572 (3d Cir.), *cert. denied*, 320 U.S. 791 (1943); *Tuttle/White Constructors, Inc. v. Montgomery Elevator Co.*, 385 So. 2d 98, 100 (Fla. Ct. App. 1980); *Hunt v. Ellis & Tanner, Inc.*, 739 S.W.2d 933, 938 (Tex. Civ. App. 1987); see D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* 800 (1973).

143. See *supra* text accompanying notes 125-41.

144. *Bowen v. United States Postal Serv.*, 459 U.S. 212, 238 (1983) (White, J., dissenting).

cent cause has combined with the breach of the contract to bring about damage.¹⁴⁵ As in the tort cases, the courts apply a "substantial factor" test.¹⁴⁶

F. Comparison to Mixed Motive Discrimination Cases

The dominant motive test used in intentional torts cases conflicts with the tests used in the *Price Waterhouse* opinions. Even though a motive is dominant, the harm might have happened without the motive. For example, in *Alyeska* the court never asked whether Alyeska would have taken over the services in the absence of the motive of ill will. The economic and safety motives were still present; had ill will not been present, those motives may have caused Alyeska to do precisely what it actually did.¹⁴⁷ Similarly, in *Nodar* the court's question was purely factual, not counterfactual: what did happen, not what would have happened if. The sole question was whether the primary motive was the unlawful one.¹⁴⁸ Even in the retaliatory eviction cases, courts find in favor of tenants when retaliation is the landlord's dominant motive, though landlords argue that they would have taken the action for legitimate objectives.¹⁴⁹

Applying the common law of intentional torts to *Price Waterhouse*, the question the court would ask would be whether the employer's dominant motive in failing to promote the plaintiff was discrimination, that is, sex-based hostility or a stereotyped view of women. If that motive was dominant, a simultaneous concern about her relations with subordinates would not matter. The secondary concern would be as irrelevant as the safety and economic concerns in *Alyeska*, even if, as in *Alyeska*, the defendant might have taken the same action in the absence of the dominant motive. And, as in *Alyeska* and the other cases, the court would order full relief despite the argument that the event would have happened anyway.

The *Price Waterhouse* approaches to mixed motive depart from the dominant motive test used in common-law mixed motive tort cases. Under *Price Waterhouse* the court asks not whether the hostility to or a stereotyped view of the employee was the employer's dominant motive. It instead asks whether the

145. See cases cited *infra* note 146. In a discussion that immediately precedes the issue of multiple causes, Professor Arthur Corbin gave his view of the policies behind remedies for breach of contract:

The purpose for which courts exist and their remedies are applied is to promote the survival and prosperity and satisfaction of men. More specifically, the chief purposes for which the remedy in damages for breach of contract is given are the prevention of similar breaches in the future and the avoidance of private war. In order that any remedy attain these ends, the relation between the injury and the breach must be such that men will foresee a similar sequence of events, that a similar breach is likely to be followed by a similar injury and a similar remedy.

5 A. CORBIN, CORBIN ON CONTRACTS § 998, at 22 (2d ed. 1964).

146. *Momand v. Universal Film Exch.*, 72 F. Supp. 469, 481-82 (D. Mass. 1947) (Wyzanski, J.) (dictum); *Nelson v. Lake Canal Co.*, 644 P.2d 55, 59 (Colo. App. 1981); 5 A. CORBIN, *supra* note 145, § 999 & nn.22-23.

147. See *supra* notes 111-13 and accompanying text.

148. See *supra* notes 117-21 and accompanying text.

149. See *supra* notes 122-24 and accompanying text.

employer would have done the same thing in the absence of the offending motive, and finds no liability if the answer is yes.

The common-law mixed motive cases are consistent with the common-law concurrent cause cases. The motivations of two persons—one racially motivated, one not—making a decision not to hire an employee, can be compared to the two fires—one wrongfully started, one innocent—that consume the plaintiff's building. By extension, the wrongful and innocent causes can be two conflicting motivations in a single decision maker's thoughts. The common law of concurrent causation thus would dictate full relief in the mixed motive cases. To the extent that the concurrent cause cases require simply a mixture of substantial forces, without requiring that the wrongful one be dominant, they would call for liability in an even greater range of discrimination cases than would the common-law mixed motive cases.

G. *Commentary on the Comparison to Common-Law Cases*

The common-law precedents, however, have not persuaded academic commentators to support full compensation in mixed motive cases. Although the commentators cite and discuss common-law torts analogous to mixed motive discrimination cases, they fail to draw the obvious conclusion from the analogy. Instead of contending that those cases support full relief for the defendant's conduct, they stop the analysis short, then ultimately suggest limited remedies such as nominal damages, cease and desist orders, and damages for emotional harm associated with discrimination.¹⁵⁰ Professor Brodin, for example, notes that when the conduct of two defendants concurs to produce a tort that either alone would have caused, there is joint and several liability upon a showing that each cause is a substantial factor.¹⁵¹ However, he cites this merely as support for the proposition that courts in tort cases "view 'cause in fact' from a goal-oriented perspective and to shape it to respond to changing societal needs."¹⁵² He fails to see that mixed motives are like tortious actors, and that the rule of full relief might be applied in mixed motive cases as it is in the tort cases.¹⁵³

Of course, the commentators' failure to follow the common-law analogy to its logical conclusion does not answer the question whether an approach based

150. See, e.g., Brodin, *supra* note 12, at 323; see also Stonefield, *supra* note 13, at 121-22, 139 (rejecting common-law substantial factor test, apparently on the ground that the remedy is inappropriate, in favor of but-for test, as applied to dignitary harms, but not to loss of job or other benefit).

151. Brodin, *supra* note 12, at 315 n.99.

152. *Id.* at 315.

153. Professor Eaton goes one step further than Brodin. He notes the existence of the rule that when tortiously caused and innocently caused fires merge to destroy plaintiff's property, the tortfeasor is liable for the whole damage. Eaton, *supra* note 13, at 454 & nn.65-66. Looking to *Mount Healthy*, the case upon which the plurality and the White concurrence relied, he acknowledges, "Application of these common-law principles to the *Mt. Healthy* case could produce a different result." *Id.* at 455. But he does not advocate such a result, and although he suggests that *Mount Healthy*'s result protects governmental functions when applied to constitutional torts, *id.* at 456-58, he does not evaluate whether the protection is worth the cost of the misconduct to the victim and society at large. For a reply to the position Eaton articulates, see *infra* text accompanying notes 324-28. See generally *infra* text accompanying notes 214-22 (discussing the consistency of the commentators' positions with causation theory).

on that conclusion is superior to the approaches found in *Price Waterhouse*. To answer that question, it is necessary to compare the merits of each approach.

IV. COMPARATIVE ANALYSIS OF *PRICE WATERHOUSE* AND COMMON LAW APPROACHES TO CAUSATION IN MIXED MOTIVE CASES

To evaluate whether the common-law approach to mixed motive discrimination is superior to that of *Price Waterhouse*, it is necessary to consider the two issues of causation and remedy. An analysis of the first issue, causation, shows that the common-law approach is consistent with causal concepts advanced by philosophers and legal theorists, but the *Price Waterhouse* approaches are not. Although academic commentators discussing precursors of *Price Waterhouse* begin such an analysis, they again fail to draw the obvious conclusion that mixed motive discrimination is the cause in fact of the firing, refusal to hire, or other adverse action.

A. Causation Theory

Modern philosophers challenge the entire concept of cause and effect. Bertrand Russell contended that the idea of cause is wholly misleading.¹⁵⁴ Human beings are merely able to observe correlations, the fact that one event follows another in time. The fact that one event follows another with some regularity may make predictions about the second event occurring quite accurate, but prediction is not causation.¹⁵⁵

Earlier philosophers were less skeptical.¹⁵⁶ Aristotle had no doubt of cau-

154. B. RUSSELL, *On the Notion of Cause* (1912), in MYSTICISM AND LOGIC 132 (1981).

155. Even the simplest ideas about cause may be broken down into series of predictions, none of which is a statement of cause as people customarily use the term. Science, for Russell, is the formulation of laws based on the uniform sequence of events in a nature that is assumed to be uniform. *Id.* at 142-43. But these scientific laws are not statements of causation; they are statements of prediction. In a similar vein, R.G. Collingwood has argued that cause and effect has no meaning except in the highly limited—and for Collingwood somewhat dubious—situation when it refers to the giving of an inducement to a conscious and responsible individual to make a free and deliberate choice to do something. Collingwood, *On the So-Called Idea of Causation* (1938), in FREEDOM AND RESPONSIBILITY 303 (H. Morris ed. 1961). C.S. Peirce foreshadowed those assaults on conventional thinking with his argument that the acceptance of the certainty of causal relationships implies a deterministic view of the universe, in which all facts are determined by causal laws. PEIRCE, *The Doctrine of Necessity Examined* (1892), in PHILOSOPHICAL WRITINGS OF PEIRCE 324, 324-27 (J. Buchler ed. 1955). Peirce rejected that view in favor of one in which human will and chance play a part in events. *Id.* at 336-38.

156. Moritz Schlick did much to reconcile recent lines of thought with earlier ones by emphasizing that causation is a matter of human understanding only, not a description of nature that exists apart from human attempts to impose meaning on experience. Schlick, *Causality in Everyday Life and in Recent Science* (1932), in FREEDOM AND RESPONSIBILITY, *supra* note 155, at 292. The texts of earlier philosophers indicate some harmony with his approach. Aristotle, whose theory purported to describe the world rather than human understanding of it, nevertheless characterized cause as the answer to the human question "why." Aristotle, *The Physics* (Book 2), in 1 ARISTOTLE, THE COMPLETE WORKS 329, 338 (J. Barnes ed. 1984). Hume was more explicit, stating that the opinion that every object owes its existence to a cause derives not from the certainty of knowledge or scientific reasoning, but from rough human observations. D. HUME, A TREATISE OF HUMAN NATURE 82 (J. Selby-Bigge ed. 1888) (reprinted 1964). "Upon the whole, necessity is something that exists in the mind, not in the objects." *Id.* at 165. Following Russell, Schlick conceded that the human understanding of cause has at its base a network of predictions, but he contended that humans can rely on those predictions quite adequately in everyday pursuits. Schlick, *supra*, at 300-02. Other writers,

sation's reality, though he did not analyze it in terms of but-for relationships.¹⁵⁷ David Hume argued that causation is beyond direct human perception,¹⁵⁸ but still can be said to depend on the contiguity of objects in a causal chain, with the cause preceding the effect in time.¹⁵⁹ In general, Hume did not pose the counterfactual and ask if the effect could exist without the presence of the supposed cause.¹⁶⁰ Instead, he simply reasoned that a supposed cause is not a cause if it is not uniformly followed by the effect within the observer's experience.¹⁶¹

John Stuart Mill recognized that multiple causes may act together. He defined cause as the totality of the conditions that invariably lead to the effect.¹⁶² He denied that causal laws could identify a dominant or chief cause among the various causal conditions.¹⁶³ At times he employed a but-for test.¹⁶⁴ Still, he also spoke of the "conjunction of several" causes leading to a phenomenon, without requiring a but-for relationship between the effect and any one of the conjoined causes.¹⁶⁵ Thus the necessity, that is, the invariability, of the cause and effect relationship does not depend on the but-for test.

nevertheless, have disputed Schlick's approach, contending that causation is a phenomenon of the universe and its own workings, not a human construct that lacks ontological significance. *E.g.*, J. MACKIE, *THE CEMENT OF THE UNIVERSE* 2 (1974).

157. He believed there are four types of causal relationships: matter (bricks cause houses or letters cause syllables); form (a triangle of a given shape causes certain measurements or a seed causes a tree); primary source of change or rest; and "for the sake of which," a relationship which may be reduced to the form category. Aristotle, *supra* note 156, at 338. Most relevant for present purposes, he believed that chance and spontaneous action of natural objects or animals, although they could be the source of change or rest, are distinct from causes that fall under the form category, that is, activity that occurs to fulfill some purpose or archetype. *Id.* at 336-37. The latter activity he characterized as being regular or nearly regular. *Id.* at 335. This relationship of regularity suggests a but-for relationship, but his qualification that such causal relationships need not happen every time, and his recognition of chance as having causal properties suggest that his theory may accommodate the idea that any contribution to causation is causation in fact.

158. D. HUME, *supra* note 156, at 74.

159. *Id.* at 75-76. Even if those conditions apply, there is still no causation without a necessary connection between the cause and the effect. *Id.* at 77. Nevertheless, such a necessity can never be known to the point of certainty; causal understanding hinges on human guesswork that the universe is uniform, and that the course of nature continues always the same. *Id.* at 82, 87-89.

160. In discussing rules to judge the cause and effect, Hume did note the maxim, "The same cause always produces the same effect, and the same effect never arises but from the same cause." *Id.* at 173. But it appears that he was speaking of categories of causes and effects, that is, types of events, rather than of the cause and effect relationship between particular events. In an adjacent passage, he spoke of the situation in which "several different objects produce the same effect," *id.* at 174, an impossibility if the effect never occurred in the absence of the cause. He also entertained the idea that causes might need to be "assisted" by other causes. *Id.* at 174-75. Each such "not complete" cause would of course fail all aspects of the necessity test in the absence of the assisting cause.

161. *See id.* at 91. Hume further allowed that contrary causes may disrupt the operation of causation, and thus that humans may perceive an absence of necessity in the relation of cause and effect. *Id.* at 132. Hume viewed chance as the negation of cause where it may be said to operate, but not as a threat to the general idea of causation. *Id.* at 125.

162. J.S. MILL, *A SYSTEM OF LOGIC* Bk. III, ch. 5, § 3, at 217 (1850) ("The cause, then, philosophically speaking, is the sum total of the conditions, positive and negative, taken together; the whole of the contingencies of every description, which being realized, the consequent inevitably follows.").

163. *Id.* ch. 5, § 3, at 215.

164. *E.g.*, *id.* ch. 5, § 6, at 222 ("That which will be followed by a given consequent when, and only when, some third circumstance also exists, is not the cause, even although no case should ever have occurred in which the phenomenon took place without it."); *id.* ch. 8, § 2. *But see id.* ch. 10, § 2, at 286 (characterizing the method of agreement, a form of the but-for test, as "uncertain").

165. *Id.* ch. 10, § 7; ch. 6, § 1; ch. 10, § 7.

Legal sources discussing causation have used several approaches. Some commentators have spoken of causation as an essential, but undefinable, phenomenon like color.¹⁶⁶ Others have spoken of causation as something that can be understood by reference to a set of common-sense rules¹⁶⁷ or paradigms.¹⁶⁸ The most significant recent development in legal thinking about cause is the application of probability ideas. A probabilistic account of causation must deal with the absence of a but-for relationship in events. To use Professor Schauer's example, tobacco smoking causes lung cancer even though lung cancer might occur in a person who does not smoke.¹⁶⁹ The cause increases the incidence of the effect in repeated trials, with other variables controlled to the extent possible.¹⁷⁰ Though the relationship is causal, it is not one of but-for causation.¹⁷¹

The vast majority of legal sources rely on philosophers' arguments to conclude that any causal factor that contributes to a harmful decision is a cause-in-fact of the full harm. Thus, Professor Epstein discards the but-for test when discussing causal paradigms, and acknowledges that one of several forces is still a cause.¹⁷² In doing so he echoes Professor Jeremiah Smith, who, writing near the turn of the century, rejected the but-for test for causation in cases in which two or more tortious causes combine to produce an effect.¹⁷³ Professors H.L.A. Hart and Tony Honore emphasize that this reasoning applies directly to mixed motive employment discrimination cases: the discrimination causes the adverse action.¹⁷⁴

Applying these ideas to *Price Waterhouse*, one would say that the discrimination caused the adverse employment action, just as in *Corey v. Havener* each

166. A. BECHT & F. MILLER, *THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY* 5 (1961).

167. H. HART & T. HONORE, *CAUSATION IN THE LAW* 26 (2d ed. 1985).

168. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 166 (1973).

169. Schauer, *Causation Theory and the Causes of Sexual Violence*, 1987 AM. B. FOUND. RES. J. 737, 753.

170. *Id.* Schauer concedes that such relationships are not known as a matter of certainty, but notes that humans constantly use hypotheses that are not known, or even knowable, to the point of certainty. *Id.* at 759-60. Peirce emphasized that any induction, presumably even of a causal law in a case in which observation shows a perfect regularity of occurrence, is not known to the point of certainty, because no one can observe future occurrences. Peirce, *The General Theory of Probable Inference* (1883), in C. PEIRCE, *supra* note 155, at 199. Professor Rizzo notes that the same evidence may reflect either truly probabilistic causation (at some measurable rate, the consequence sometimes happens) or causation that is simply unknown (at some measurable rate, there is an unknown factor that will yield the consequence whenever the unknown factor is there). Rizzo, *Foreword: Fundamentals of Causation*, 63 CHI.-[KENT L. REV. 397, 403 (1987).

171. For further discussion of these concepts in the context of apportionment of causal responsibility, see *infra* text accompanying notes 259-65.

172. Epstein, *supra* note 168, at 168 (discussing "force" paradigm of causation and discarding but-for test).

173. Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 109 n.109 (1911) (referring to case of two or more tortious causes combining as exception to but-for test); see Wright, *supra* note 22, at 1797; cf. J. MACKIE, *supra* note 156, at 44-47 (philosophical basis of legal theory). *Contra* Peaslee, *Multiple Causation and Damage*, 47 HARV. L. REV. 1127, 1134-41 (1934).

174. H. HART & T. HONORE, *supra* note 167, at 194. They maintain, nonetheless, that liability should be withheld despite the causal relationship on policy grounds embodied in the underlying statutes. See generally *infra* text accompanying notes 298-318 (discussing policies relating to remedies under Title VII).

motorcycle caused the collision.¹⁷⁵ The causal relation of the motive or the motorcycle to the harm remains true even if something else was acting and would have been equally effective in the wrongful force's absence.¹⁷⁶ The but-for test yields a different result, but the but-for test is just an analytical aid, not an absolute for a finding of causation.¹⁷⁷

Many legal theorists have stressed further that causation, in law and elsewhere, is a functional concept. What the law identifies as a cause depends upon why the law is doing the identifying.¹⁷⁸ The functional approach suggests that if a causal test identifies the category of actors for whom policy dictates liability and relief, the law should employ that test. But even the most prominent among functionalism's current detractors make no objection on the ground of factual causation to assigning liability to any of the forces that constitute the cause of a harm.¹⁷⁹ Nonfunctionalist ideas of causation embrace concurrent cause cases in which the but-for test would not be satisfied.¹⁸⁰

The unifying factor between mixed motive discrimination cases and common-law mixed motive and multiple cause cases is the reality of causation of an event, even when two causal factors combine, and even when one factor would have caused the event by itself.¹⁸¹ To apply the philosophers' and legal writers'

175. See *supra* notes 125-27 and accompanying text.

176. Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 556 (1962) ("A defendant's conduct may contribute to the victim's injury even though there are other causal factors that would have caused the same or similar injury to the victim.").

177. The criminal law, following the approach of the *Restatement of Torts*, establishes liability based on an offender's actions being the substantial cause, even when other noncriminal forces also cause the harm. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 312(c) (2d ed. 1986) (citing cases).

178. E.g., Borgo, *Causal Paradigms in Tort Law*, 8 J. LEGAL STUD. 419, 439 (1979); Calabresi, *Concerning Cause and the Law of Torts*, 43 U. CHI. L. REV. 69, 106 (1975); Landes & Posner, *Causation in Tort Law: An Economic Approach*, 12 J. LEGAL STUD. 109, 110 (1983); Malone, *Ruminations on Cause in Fact*, 9 STAN. L. REV. 60, 61-63 (1956); Weinrib, *A Step Forward in Factual Causation*, 38 MOD. L. REV. 518, 530 (1975). *Contra* Weinrib, *Causation and Wrongdoing*, 63 CHI.-J. KENT L. REV. 407, 409 (1987) [hereinafter, Weinrib, *Causation and Wrongdoing*]. Dean Calabresi, in a forceful exposition, contends that "in law the term 'cause' is used in different guises but always to identify those pressure points that are most amenable to the social goals we wish to accomplish." Calabresi, *supra*, at 106 (emphasis in original). Despite Hart and Honore's apparent use of such an approach in some instances, e.g., H. HART & T. HONORE, *supra* note 167, at 11-12, 63, they criticize it for, among other things, failing to account for cases in which something that cannot be changed is called the cause, *id.* at 33-37. This misses the point. In those cases, it is of significance to the legal system that the something that it cannot change "caused" the harm, because then the legal system can be secure that it does not need to do anything. Stated another way, the legal system's location of the cause somewhere where liability rules do not matter is highly functional to the business of assigning or withholding liability.

In line with Hume, the functional approach puts the emphasis on human understanding and its attempts to deal with the problem at hand. Nevertheless, few of the legal writers who use a functional approach would go as far as Russell in denying the existence of causation altogether. See A. BECHT & F. MILLER, *supra* note 166, at 21. Though they fail to discuss the matter in as straightforward a fashion as Mackie or Schlick, Hart and Honore appear to reject the idea that causation exists only in the human understanding. They do, nevertheless, apply concepts of legal causation that select causes based on common-sense ideas related to the objectives of the legal system.

179. See Epstein, *supra* note 168, at 160-61; Wright, *supra* note 22, at 1782-83.

180. Wright, *supra* note 22, at 1791.

181. Not only does the common law follow the philosophers' view that any cause of the harm is the cause in fact, the law goes considerably further to impose liability and award relief in some cases in which there is no causal connection whatever between the defendant's wrongful conduct and the plaintiff's injury. In those cases, liability is imposed on the defendant for policy reasons alone. The cases underscore the adequacy of the causal showing in mixed motive discrimination cases, and they

insights on causation to the discrimination cases, if the court finds that the employer actually considered race, sex, or another prohibited factor, discrimination caused the result. The court should impose liability and full relief to correct that result.¹⁸² The analogy to the common law cases requires that full damages be

suggest that even if that showing were deemed inadequate, full relief might still be imposed on policy grounds.

The first class of cases is "public purposes" torts, cases in which public officials interfere with voting, invade privacy, falsely imprison, or otherwise infringe important rights. The courts award general damages for the presumed, but unproven, harm caused by the conduct. Doubts about the validity of such presumptions have led one commentator to conclude that courts really permit the large awards because of "public law purposes": the verdicts "often operate to enforce limits upon the official or unofficial power of persons in authority and to preserve rights of the public generally to be free of oppressive conduct." D. DOBBS, *supra* note 142, at 531. The passage continues: "It may well be that substantial damages are permitted in these cases partly in recognition that such public purposes are being served rather than in any belief that a person falsely arrested has suffered humiliation worth \$100,000." *Id.* In *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986), a case that involved the suspension of a tenured teacher, without hearing, on account of inaccurate rumors about his curricular choices in teaching about human reproduction, the Supreme Court insisted that compensation of actual damage is the only legitimate purpose of any award that is not explicitly an award of punitive damages. *Id.* at 306-10. Though the Court held that Stachura's loss of the right to a hearing and the right to free speech did not require presumed damages as a "rough substitute for compensatory damages," it reaffirmed the use of presumed damages in defamation and voting cases. *Id.* at 310-11 & n.14. As long as disproportionately large presumed damages awards survive, they serve as examples of significant monetary relief without proof of any causation of the loss.

Second, there are private law tort cases in which there is effectively no causation requirement for the award of a remedy. Courts have so relaxed the causation requirement in product liability actions over injuries from dangerous goods that lack adequate labels that a prominent commentator has declared that the causation requirement no longer exists in such cases. Schwartz, *Causation in Private Tort Law: A Comment on Kelman*, 63 CHI.-[KENT L. REV. 639, 644 (1987). As a means of encouraging manufacturers to give adequate warnings, the courts impose relief even though plaintiffs cannot prove they would have read the labels. *Id.* (citing cases). Other examples of tort liability without causation are: respondeat superior, *Towns v. Yellow Cab Co.*, 22 Ill. 2d 113, 382 N.E.2d 1217 (1978); *Hinman v. Westinghouse Elec. Co.*, 2 Cal. 3d 956, 471 P.2d 988, 88 Cal. Rptr. 188 (1970); premises liability, RESTATEMENT (SECOND) OF TORTS § 520C (1977); and strict liability, *Liberty Mut. Ins. Co. v. Williams Mach. & Tool Co.*, 62 Ill. 2d 77, 338 N.E.2d 857 (1975). Of course, in each of these cases there is a causal connection between the defendant and the harm, but there is no causal connection between any wrongdoing by the defendant and the harm.

Damages are awarded without any proof of causation in a third category of cases: contract actions in which courts award general and liquidated damages without a showing of causation. One distinguished commentator has noted that artificial "general damages" rules compel courts to award significant damages irrespective of a lack of actual harm flowing from defendant's conduct. D. DOBBS, *supra* note 142, at 798. Policy reasons justify such results: "Under general damages formulae we can justify giving the plaintiff recovery for a loss he may not in fact have had, on the ground that it is an administrative device, like a liquidated damage clause, to save the highly individualized calculation in difficult cases." *Id.* at 799. With liquidated damages clauses, the same policy gives rise to the same result. See *Stephens v. Essex County Park Comm'n*, 143 F. 844 (3d Cir. 1906).

A fourth category of liability without causation, restitutionary awards may be made even when the defendant has not caused plaintiff any loss compensable under ordinary damages rules. D. LAYCOCK, *MODERN AMERICAN REMEDIES* 463 (1985). Willful infringements of established rights that enable the defendant to make a profit are, as a matter of policy, to be discouraged. See *id.*

The particular factors that lead courts to award damages in these four categories of cases may or may not be present in mixed motive cases. But the cases cap the argument that but for causation is not an ironclad requirement for liability and relief.

182. Causal skeptics—legal writers Professors Landes and Posner and Professor Kelman, following philosophers Russell and Collingwood—have such doubts about causation generally that they applaud the imposition of relief, under proper circumstances, without any showing of causation at all. Landes & Posner, *supra* note 178, at 110; see Kelman, *The Necessary Myth of Objective Causation Judgments in Liberal Political Theory*, 63 CHI.-[KENT L. REV. 579, 633 (1987). See generally *supra* note 181 (discussing liability without causation). A generation ago, Professor Clarence Morris argued that causation—of any type—is not absolutely necessary for liability, and that

awarded even when the individual would not have been hired, or would have been fired, for other reasons. The point is that the employee was not hired, or was fired, *because of* this reason.

B. The Weakness—and Strength—of the Approaches Advanced in Price Waterhouse

The *Price Waterhouse* plurality's rejection of but-for causation was correct. Consistent with the philosophers,¹⁸³ the legal writers,¹⁸⁴ and the common law of torts and contracts,¹⁸⁵ the plurality recognized that contribution to an event's occurrence is causation of it.¹⁸⁶ As Hart and Honore wrote in their discussion of the *Mount Healthy* case, if a discriminatory motive contributes to an employment decision, it causes it.¹⁸⁷ If the court withholds liability in such a situation, that decision rests on policy grounds, not lack of causation.¹⁸⁸

The *Price Waterhouse* plurality stumbled, however, when it concluded that the employer is not liable if it would have made the same decision anyway.¹⁸⁹ To reach the conclusion, Justice Brennan had to invent a management prerogative exception for mixed motive cases brought under Title VII. There is simply no basis for such an exception.¹⁹⁰ Congress was solicitous of management prerogatives, but it embodied its solicitude in the terms of the statute itself, in such provisions as the one allowing discrimination in cases of bona fide occupational qualification (BFOQ). Nothing more can be made of the BFOQ provision.¹⁹¹

the focus should be off causation and on the issue of blame. "In these multiple cause cases, the notion that actual causation is prerequisite to liability is a misleading nuisance. The central problem is: should the defendant be held to blame for the injury, even though, in some sense, causal connection may in fact be lacking?" Morris, *Duty, Negligence and Causation*, 101 U. PA. L. REV. 189, 212 (1952). By "blame," Morris meant a connection with the injury, even if not strictly causal, sufficient that imposition of damages furthers the law's purposes. *Id.*; see Pedrick, *Causation, the "Who Done It" Issue, and Arno Becht*, 1978 WASH. U.L.Q. 645, 654.

Whether the law should dispense with a showing of causation in employment discrimination cases depends upon the importance of the policies that such an approach would advance, the possibility of accomplishing those policies by other means, and the significance of any countervailing policies that such an approach would frustrate. These policies are taken up below in the discussion of remedial policy. See *infra* text accompanying notes 223-328. The approach to mixed motive discrimination advanced in this Article does not require the abandonment of the causation requirement. But even if it did, the proposed approach would still be justified, as long as policy considerations support full relief in the cases to which it applies.

183. See *supra* notes 154-65 and accompanying text.

184. See *supra* notes 166-82 and accompanying text.

185. See *supra* notes 125-46 and accompanying text.

186. Justice Brennan's example of combining physical forces is unanswerable, *Price Waterhouse*, 109 S. Ct. at 1786, and the concurring and dissenters barely try to answer it. *Id.* at 1795-96 (White, J., concurring), 1797 (O'Connor, J., concurring), 1808 n.2 (Kennedy, J., dissenting). Even Justice Kennedy's failed attempt to do so is revealing. Rather than challenge whether the two forces are in fact causes, he simply says that such a test for liability is inconsistent with Justice Brennan's ultimate position that there is no liability when the employer proves it would have made the decision anyway. *Price Waterhouse*, 109 S. Ct. at 1808 n.2 (Kennedy, J., dissenting). Both Justice Kennedy and Justice Brennan are right. There is causation, and liability should exist.

187. H. HART & T. HONORE, *supra* note 167, at 194.

188. *Id.* at 194.

189. *Price Waterhouse*, 109 S. Ct. at 1795.

190. *Id.* at 1808-09 (Kennedy, J., dissenting).

191. But see *id.* at 1786 (plurality opinion).

As the plurality noted, legislative history preserves "the employer's right to insist that any prospective applicant, Negro or white, must meet applicable job qualifications," and says that any nonforbidden "criterion or qualification for employment is not affected" by the statute. But liability for employers in mixed motive cases does not force them to hire anyone without qualifications. It merely forces them to answer for failing to hire someone on the basis, in part, of unlawful discrimination. Even if full remedies for violations can include orders to hire or reinstate, the doctrine of undue hardship would protect a guilty employer against hiring someone incapable of doing the job.¹⁹²

Liability for discrimination under the statute has no implicit exceptions. Justice Kennedy emphasized: "Title VII unambiguously states that an employer who makes decisions 'because of' sex has violated the statute."¹⁹³ Any affirmative defense that the adverse action would have taken place anyway is "not found in the language or legislative history of Title VII."¹⁹⁴

Justice O'Connor and Justice Kennedy tried to avoid the dilemma of the plurality by saying that Congress imposed a but-for causal test for Title VII liability.¹⁹⁵ But apart from the stray comments about but-for causation that could be found in discussion of any statutory or common law liability, the legislative history has nothing to suggest that Congress intended to do so.¹⁹⁶ None of the comments address multiple causation. Congress's only recognition of multiple causation was in its rejection of an amendment to section 706(g) of the Act that would have required discrimination to be the sole cause of adverse action in cases in which the court awards reinstatement and back pay.¹⁹⁷ The rejection of the amendment indicates that Congress did not adopt a but-for test.¹⁹⁸

Justice O'Connor was not wrong but irrelevant in referring to cases in which courts shift the burden of proof because the defendant's wrongdoing leads to causal uncertainty. Cases of that type are not necessarily multiple causation cases. For example, in *Summers v. Tice*,¹⁹⁹ the first such case Justice O'Connor cites,²⁰⁰ two hunters, using identical shot, negligently discharged their rifles in plaintiff's direction. One hit plaintiff's eye.²⁰¹ That was not a case of multiple causes, but one of true causal uncertainty. One hunter alone caused the harm, but there was no way to tell which one. The court in effect established multiple liability for single causation by shifting the burden of proof to each of the

192. See *infra* text accompanying notes 322-26.

193. *Price Waterhouse*, 109 S. Ct. at 1809 (Kennedy, J., dissenting).

194. *Id.* (Kennedy, J., dissenting).

195. *Id.* at 1797 (O'Connor, J., concurring); *id.* at 1807 (Kennedy, J., dissenting).

196. Many authorities speak generally of the need for but-for causation to establish liability, but nevertheless treat multiple causation paradigms differently. E.g., W. PROSSER & W. KEETON, *supra* note 43, § 41, at 265-68.

197. See Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COMM. L. REV. 431, 456 (1966).

198. *Price Waterhouse*, 109 S. Ct. at 1785 & n.7 (plurality opinion).

199. 33 Cal. 2d 80, 199 P.2d 1 (1948).

200. *Price Waterhouse*, 109 S. Ct. at 1797 (O'Connor, J., concurring).

201. *Summers*, 33 Cal. 2d at 82, 199 P.2d at 1.

hunters to show that it was not his pellet that hit plaintiff.²⁰²

Multiple causation can create genuine uncertainty whether a given factor contributed to the harm. But in those multiple causation cases the burden that courts shift is not that of showing that the same event would have happened anyway. Instead, as Justice O'Connor herself quoted from Wigmore, it is "the burden of proving that the other person, or his other act, was the *sole cause of the harm*."²⁰³ If the other factor was the *sole* cause, there is no liability. If both factors contributed, both wrongdoers are liable.

In multiple causation paradigms a but-for causal test is wrong both in logic and in law. Such a test does support the outcome in *Price Waterhouse* without the creation of a new management prerogative exception to Title VII, but if that is a virtue it is its solitary one.

Justice White's concurrence attempted to mask the inconsistency of the reasoning in the case with the unexplained citation of precedent. "In my view, to determine the proper approach to causation in this case, we need look only to the Court's opinion in *Mt. Healthy* . . ."²⁰⁴ But *Mount Healthy* suffers from the same defective reasoning as *Price Waterhouse*; the brevity of its exposition merely conceals its illogic. In *Mount Healthy*, a school board fired a teacher on the basis of activity protected under the first amendment: the teacher's unauthorized disclosure of a new teacher dress code to a radio station.²⁰⁵ But the employer's statement of reasons for its refusal to renew the teacher's contract listed both that incident and another one involving the teacher's use of rude gestures in the cafeteria.²⁰⁶ Moreover, the statement also contained a general assertion that the teacher displayed "a notable lack of tact in handling professional matters,"²⁰⁷ which may have been a reference to yet another incident, one involving a physical confrontation and running argument with a coworker.²⁰⁸ The district court found that the teacher's exercise of first amendment rights "played a substantial part in the decision not to renew" the employment contract, but acknowledged that the other, legitimate reasons also played a part.²⁰⁹

The Supreme Court opinion in *Mount Healthy* discussed the selection of an appropriate rule of causation in such a case:

A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place the employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing.²¹⁰

202. *Id.* at 86, 199 P.2d at 4.

203. *Price Waterhouse*, 109 S. Ct. at 1798 (O'Connor, J., concurring) (emphasis added) (quoting 2 J. WIGMORE, SELECT CASES ON THE LAW OF TORTS § 153, at 865 (1912)).

204. *Id.* at 1795 (White, J., concurring).

205. *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 281-83 (1977).

206. *Id.* at 283.

207. *Id.* at 283 n.1.

208. *See id.* at 281-83.

209. *Id.* at 284-85. For additional comments on *Mount Healthy*, see *infra* note 221 and accompanying text.

210. *Mount Healthy*, 429 U.S. at 285.

According to the Court, if the employer "would have reached that decision had not the constitutionally protected incident . . . occurred," the decision not to renew employment would not "necessarily amount to a . . . violation justifying remedial action."²¹¹ Although the Court's phrasing is ambiguous, that language seems to require dismissal if the complained-of event would have occurred anyway.²¹²

The gist of the reasoning is that following the ordinary rules of causation yields a result the Court does not like. The Court's argument thus sounds in remedy, not causation. Part V of this Article takes up the argument of *Mount Healthy* and various commentators that granting relief in cases in which the adverse action would have occurred anyway is disproportionate or otherwise disadvantageous.²¹³

C. *The Position of the Commentators*

Authorities on mixed motive discrimination apply the correct causation rules to mixed motive discrimination cases. Nevertheless, they fail to draw the conclusion that the discrimination causes the entirety of the adverse action. Although they generally advocate imposition of liability even when the employer would have made the same decision on other grounds, they nevertheless argue that the but-for causal test should bar reinstatement and back pay. Professor Brodin attacks the but-for causal test, saying that it ignores statutory policy and is impractical.²¹⁴ He even emphasizes that causation rules always respond to policy concerns.²¹⁵ But he would defy his own causal analysis by applying the but-for test to deny victims of mixed motive discrimination back pay and reinstatement.²¹⁶

Professor Stonefield criticizes the but-for causal test on similar grounds, but nevertheless concludes that it ought to be used to deny back pay and reinstatement in mixed motive cases.²¹⁷ He would permit damages for emotional distress in cases in which discrimination is the cause in a but-for sense, but he would deny back pay and hiring relief because the loss of the job would have occurred anyway.²¹⁸ Professor Belton in a recent article recites authorities rejecting the but-for test,²¹⁹ but still advocates imposition of such a test on individual dispa-

211. *Id.* The Court's peculiar phrasing left unclear whether any liability attaches to the employer's conduct, or whether no remedy is appropriate under the circumstances. See *infra* note 221.

212. *Mount Healthy*, 429 U.S. at 285. Differing interpretations of the language led to the diversity of results in mixed motive Title VII cases prior to the opinion in *Price Waterhouse*. See *infra* note 221 and accompanying text.

213. See *infra* text accompanying notes 223-328.

214. Brodin, *supra* note 12, at 317-22.

215. For example, he discusses the rule that a ship operator is liable for an overboard seaman's death if the operator fails to throw a line, no matter how remote the chances of the seaman's rescue. *Id.* at 318 n.110.

216. *Id.* at 323-25. Brodin's approach fares no better as a remedial test. See *infra* text accompanying note 229. Brodin hints at the remedial issue, but does not discuss it in detail. See Brodin, *supra* note 12, at 324-25 n.130.

217. Stonefield, *supra* note 13, at 120-22.

218. *Id.* at 120-28.

219. Belton, *supra* note 14, at 1248 nn.53-55. Belton even states that a "strong argument can be

rate treatment cases involving mixed motives.²²⁰

Remedy, not causation, is the only possible basis for the position of these sophisticated observers.²²¹ Brodin, echoing *Mount Healthy*, says that "back pay and reinstatement [would] place the plaintiff in a better position than he would have been in had the violation not occurred."²²² A discussion of remedial policy will demonstrate that Brodin's concern is unwarranted.

V. THE ISSUE OF REMEDY IN MIXED MOTIVE CASES

To evaluate the superiority of the common-law approach to mixed motive discrimination cases, it is necessary to consider remedial goals. Remedial goals in mixed motive cases should be the same as those in all cases: compensation;²²³ deterrence of wrongdoers;²²⁴ reinforcement of the community's sense of justice and prevention of dangerous self-help solutions;²²⁵ and furtherance of statutory policies. Pursuit of these goals should be tempered by considerations of practicality.²²⁶ Further examination of the issues demonstrates that full relief serves those objectives within the limits of practicality in mixed motive discrimination cases.

A. Compensation

Compensation demands that the party whose discrimination causes harm pay for the total harm, despite a mixed legitimate cause. Although arguments based on contributory fault, valuation, and probabilistic apportionment challenge that conclusion, those challenges do not hold up.

1. Compensation and Causation

A careful analysis of causation reveals that in mixed motive cases, the dis-

made that causal analysis should not be as critical an element in employment discrimination law as it is in the law of negligence." *Id.* at 1242.

220. *Id.* at 1299.

221. Perhaps, despite the Court's use of the word "causation," this is what the *Mount Healthy* Court had in mind all along. The Court never denied that the intention to punish for the assertion of constitutional rights caused the discharge. Instead, it went on at length about how disadvantageous it would be to grant a remedy for the discharge that the intention to penalize caused. *Mount Healthy School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284-87 (1977). The Court seemed to recognize its remedial orientation with this sentence: "The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the [protected] conduct." *Id.* at 285-86. The Court buttressed its position with analogies to criminal procedure cases in which the Court found constitutional violations by the police not to justify the remedy of suppressing evidence. *Id.* at 286-87.

Most commentators have analyzed *Mount Healthy* not as a case lacking proof of causation, but as a case in which the Court applied remedial policy ideas to limit relief that otherwise would be justified by the harm the defendant actually caused. H. HART & T. HONORE, *supra* note 167, at 194; Brodin, *supra* note 12, at 325; Stonefield, *supra* note 13, at 165; Wolly, *supra* note 13, at 392.

222. Brodin, *supra* note 12, at 325; see Note, *Mixed-Motive Smokescreen*, *supra* note 13, at 874 n.68.

223. See D. LAYCOCK, *supra* note 181, at 2.

224. See R. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 243 (3d ed. 1986).

225. 5 A. CORBIN, *supra* note 145, § 1002, at 33.

226. D. DOBBS, *supra* note 142, at 4-5.

crimination does cause the plaintiff's harm.²²⁷ Even the narrowest idea of compensation at least would make wrongdoers pay victims for the harms they cause them. Thus wrongdoers in mixed motive cases should be made to hire and give back pay.²²⁸ Brodin is therefore incorrect when he suggests that reinstatement or back pay overcompensates.²²⁹ Stonefield, too, errs in contending that failure to apply a but-for test punishes the discriminator for a mere state of mind.²³⁰ Awarding full relief merely compensates for the harm the wrongdoer caused.

Justice Robert Peaslee of the New Hampshire Supreme Court contended in a 1934 article about negligence²³¹ that the but-for test ought to be an absolute standard for both causation and compensation: When the conduct of a single tortfeasor combines with natural or other innocent causes and results in injury, the defendant's conduct has not enhanced the loss, and any judgment against the defendant is a windfall; the wrongful conduct, though it may be the cause of an event, is not a cause of the loss.²³²

A year later, Professor Carpenter responded to Justice Peaslee.²³³ He argued that the but-for test had no magical power for determining either cause or compensation. The causal question must be determined by reference to what actually did happen, not what would have happened under different circumstances.²³⁴ After that threshold of causation is established, compensation becomes a question of remedial policy. The relevant policy is to compensate the innocent victim of wrongful conduct, and not to permit wrongdoers to escape actual consequences of wrongful acts.²³⁵

As a matter of both logic and policy, Carpenter is correct. Evidence of the weakness of Justice Peaslee's position is that even he would award full compensation when the wrongful conduct of two tortfeasors combines to cause the

227. See *supra* text accompanying notes 172-82.

228. Hiring and back pay are the ordinary remedies in Title VII cases.

229. Stonefield makes an equivalent statement, which falls to the same argument. See Stonefield, *supra* note 13, at 139.

230. See *id.* at 170-72. Justice O'Connor takes the same position in her concurrence in *Price Waterhouse*, 109 S. Ct. at 1797 (O'Connor, J., concurring). The discriminator is not being punished, but merely forced to make whole the harm it has brought about. In multiple causation cases, it is incorrect to equate compensation with merely placing someone in the position that person would have occupied had there been no discrimination. Moreover, the law often totally disregards causation in requiring a wrongdoer to compensate an injured party. See *supra* text accompanying note 181.

231. Peaslee, *supra* note 173, at 1133-41.

232. *Id.* at 1130.

233. Carpenter, *supra* note 130.

234. *Id.* at 948. In ordinary experience, a cause that combines with another cause is considered to have resulted in an event, even though one would have been sufficient in the other's absence. Carpenter's example is that if three people all push a car off a cliff, all three have caused the car to fall, even though if only two had been present they would have provided sufficient force to get it over the edge. *Id.*

235. *Id.* at 951. As a doctrinal matter, Carpenter won the debate before it began, for in a 1932 draft of the first *Restatement of Torts*, the American Law Institute adopted the position that liability for the totality of the damage ought to attach to any actor whose conduct is a substantial force in wrongfully bringing about any indivisible injury. RESTATEMENT OF TORTS § 307(2) (Tent. Draft No. 8, 1932). This provision appeared in the final edition. RESTATEMENT OF TORTS § 432 (1934).

plaintiff's injury,²³⁶ abandoning his principles on grounds of policy.²³⁷ Moreover, even Justice Peaslee accepted the role of what he called "morality" in compensating for causal acts.²³⁸ If but-for principles and compensation are not congruent, basic concepts of fairness should begin to play a role.²³⁹ Between the wrongdoer and the victim, the wrongdoer should pay.²⁴⁰ With respect to the fairness of compensation in the sense of spreading losses among those best able to bear them, a but-for threshold is unnecessary. Any causal linkage that the system chooses will suffice, as will any system of identifying the losses to be spread.²⁴¹ It can hardly be doubted that between the discriminator and the victim of discrimination, the discriminator is in a better position to spread the loss.

2. Contributory or Comparative Fault

Some might argue that causal factors that are shortcomings of the victim should bar or reduce compensation for the same reasons that contributory or comparative fault does in negligence cases.²⁴² Comparative fault and contributory fault, however, do not influence modern ideas of compensation. Twentieth-century compensatory schemes, such as workers compensation and insurance, do not apply comparative or contributory fault concepts.²⁴³

Torts theorists contend that modern courts bar or reduce recovery for contributory or comparative fault for policy reasons unrelated to compensation: to provide would-be victims an incentive to take care, and to limit otherwise crushing tort liability.²⁴⁴ Neither of those reasons justifies eliminating or reducing

236. At least one of Justice Peaslee's modern disciples agrees. Strachan, *The Scope and Application of the "But For" Causal Test*, 33 MOD. L. REV. 386, 394 (1970).

237. Peaslee, *supra* note 173, at 1131. Justice Peaslee believed that this result was illogical, but justified on moral grounds. He thought that morality did not justify any extension of liability to the single tortfeasor whose conduct combined with an innocent or natural cause. *Id.*

238. *Id.* at 1128. Justice Peaslee feared that a jury might apply morality without guidance, however. *Id.* at 1129. He thought that both logic and correct moral guidance would yield a result of no liability in the case of the single tortfeasor whose conduct combines with innocent causes. *Id.* at 1130.

Professors Becht and Miller sit on the fence in the Peaslee-Carpenter debate. In their classic study of factual causation, Becht and Miller admit that the single tortfeasor whose conduct combines with natural forces does in fact cause the harm, but say that damages is a separate issue from causation. A. BECHT & F. MILLER, *supra* note 166, at 123. Their position appears to be that the test of causation is wholly one of fact, *id.* at 1-5, but that compensation tests do have a policy component, *see id.* at 124. To the extent that the policy discussion of this Article is persuasive, it militates in favor of full relief under both the topic of cause and that of damages.

239. See McGregor, *Variations on an Enigma: Successive Causes of Personal Injury*, 33 MOD. L. REV. 378, 381 (1970).

240. See Carpenter, *supra* note 130, at 951.

241. Calabresi, *supra* note 178, at 73-76.

242. See generally W. PROSSER & W. KEETON, *supra* note 43, §§ 65, 67 (discussing contributory negligence and comparative negligence).

243. E.g., *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N.W. 209 (1911) (workers compensation).

244. W. PROSSER & W. KEETON, *supra* note 43, § 65, at 452-53. Prosser and Keeton emphasize that causation concepts do not justify barring recovery for contributory negligence:

[C]ourts have explained [contributory negligence] in terms of "proximate cause." . . . But this cannot be supported unless a meaning is assigned to proximate cause which goes beyond anything applied elsewhere. If two automobiles collide and injure a bystander, the negligence of one driver is not held to be an "insulating cause" which relieves the other of

compensation in mixed motive discrimination cases.²⁴⁵ The employees' equivalent of taking care is the acquisition of job qualifications and good performance of job duties. Economic rewards will always provide overwhelming incentives for employees to do those things. The incentives do not noticeably diminish because of the bare possibility of recovery when employee failings combine with discrimination to produce discharge or failure to hire. Crushing liability is unlikely to be a problem in Title VII disparate treatment cases. The need to prove intent to discriminate limits the number of judgments against employers.²⁴⁶ In the cases that succeed, courts restrict relief to wages and reinstatement.²⁴⁷ The undue hardship doctrine also prevents harsh remedies in Title VII cases.²⁴⁸

3. Valuation

Some courts and commentators discussing torts analogous to mixed motive discrimination justify limits on compensation by applying valuation ideas. But those valuation ideas contradict prevailing law as well as sensible remedial policy, particularly in mixed motive discrimination cases.

Professor Henderson, for example, argues that when the harm would have occurred anyway, the damages needed to compensate for the wrongdoing fall to zero or nearly zero.²⁴⁹ In a case in which the plaintiffs sued for the wrongful death of a child who was killed by the negligent conduct of the defendant but who would have died from other causes a moment later, the court refused to award damages.²⁵⁰ Henderson justifies the result by saying that the half-minute life expectancy is worth virtually nothing.²⁵¹ Some might argue that a job that is about to be lost for nondiscriminatory reasons has similarly diminished value.

Though Henderson's valuation ideas seem reasonable in some examples, they are analytically dubious. They lead to the conclusion that there will be no damages for the wrongful death of someone with a ticket to sail on the Titanic

liability. So far as causation is concerned, it can hardly have any different effect when the action is by one driver against the other.

Id. at 452 (footnotes omitted).

245. The moral force of the laws against discrimination militates against application of these doctrines even if they were justified by compensation ideas. See *infra* text accompanying notes 284-97.

246. See *Washington v. Davis*, 426 U.S. 229, 269-70 (1976) (Brennan, J., dissenting).

247. 2 C. SULLIVAN, M. ZIMMER & R. RICHARDS, *EMPLOYMENT DISCRIMINATION* § 15.1, at 54 (2d ed. 1988).

248. See *infra* text accompanying notes 319-23.

249. Henderson, *A Defense of the Use of the Hypothetical Case to Resolve the Causation Issue: The Need for an Expanded Rather than a Contracted Analysis*, 47 TEX. L. REV. 183, 207-08 (1969). Henderson distinguishes the dual tortfeasor cases from cases involving one tortfeasor and one natural cause, arguing that in the dual tortfeasor cases the second tortfeasor deprives the victim of the cause of action against the first tortfeasor for the entirety of the injury. *Id.* at 208. But as Carpenter notes, the legal system has never recognized such a "deprivation" as a cognizable injury, Carpenter, *supra* note 130, at 950, and even if it did, victims of two successive torts would fail to receive recovery for the entirety of loss when one tortfeasor was judgment proof, rendering either the lost or the new cause of action worthless, see *id.* at 951.

250. *Dillon v. Twin State Gas & Electric Co.*, 85 N.H. 449, 163 A. 111 (1932).

251. Henderson, *supra* note 249, at 204-05.

the next day.²⁵² Although a piece of property has a sale value that might decline because of the buyer's knowledge that it is about to sustain damage,²⁵³ the courts should not apply the same reasoning to decrease the compensation for damage that a human being suffers.²⁵⁴ Allowing contributory cause to diminish valuation is particularly inappropriate in mixed motive employment discrimination cases. A job is not a saleable commodity with a market value, much less a commodity with a market value that fluctuates with the employee's current qualifications and job performance. Moreover, Title VII's compensatory scheme does not award damages for the hypothetical market value of a job. It instead affords hiring orders and wages.²⁵⁵ The use of hiring orders and wage awards avoids the need for monetary valuation of the job itself.²⁵⁶

This is not to say that valuation will be easy in every mixed motive discrimination case. As with any wrongful discharge from at-will employment, it is difficult to compute the amount of wages that ought to be awarded. The common law's traditional way of dealing with this type of problem is to adopt a rule for computation of damages that appears fair in the general run of cases, without pretending that it precisely measures loss in any given case.²⁵⁷ In cases in which an order to hire or rehire is appropriate, the formula of ordinary salary minus monies earned in mitigation will yield back pay liability. When an order to hire is impractical, a court might order limited periods of front pay, pay for a fixed period or until the employee obtains another job, recognizing that the periods chosen may be somewhat artificial.²⁵⁸

4. Probabilistic Causal Apportionment

Some modern commentators discussing torts suggest that courts should use probabilities to apportion losses between innocent and negligent concurring causes.²⁵⁹ A court might apply such a theory to mixed motive discrimination cases, reducing the damages when another reason to fire or refuse to hire con-

252. See Thode, *A Reply to the Defense of the Use of the Hypothetical Case to Resolve the Causation Issue*, 47 TEX. L. REV. 1344, 1355-57 (1969).

253. This is one of Henderson's examples. Henderson, *supra* note 249, at 207.

254. See Thode, *The Indefensible Use of the Hypothetical Case to Determine Cause in Fact*, 46 TEX. L. REV. 423, 430 (1968) (emphasizing that public policy against tortious conduct is often strong enough to compel recovery in such cases).

255. See *supra* note 228.

256. Henderson's valuation theory is also inappropriate in mixed motive discrimination cases because of the strong remedial goals other than compensation in these cases, such as deterrence and furtherance of the community sense of justice. See *infra* text accompanying notes 273-97. Fairly applying the theory would also be difficult.

257. See generally Note, *Remedies for Employer's Wrongful Discharge of an Employee from Employment of an Indefinite Duration*, 21 IND. L. REV. 547, 548 (1988) (discussing traditional rule that deemed unspecified term of employment to be for one year).

258. See generally *infra* text accompanying notes 319-20 (discussing remedies that might be used when hiring or reinstatement is inappropriate).

259. King, *Causation, Valuation and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353 (1981). King argues:

The defendant should be subject to liability only to the extent that he tortiously contributed to the harm by allowing a preexisting condition to progress or by aggravating or accelerating its harmful effects, or to the extent that he otherwise caused harm in excess of that attributable solely [*sic*] to preexisting conditions. The effect of preexisting conditions

tributed to the decision. The court would calculate the probability that the discriminatory motive alone would have caused the adverse action, compare it to the probability that the innocent motive would have, and apportion back pay or other relief based on the comparative likelihood of adverse action on account of the guilty motive and the innocent one.

Both the theory and its application to mixed motive cases are unsound, however. Probabilistic causation confuses prospective and retrospective risk analyses.²⁶⁰ A bolt of lightning is highly improbable viewed from before its strike, but it is 100 percent probable in retrospect. Indeed, every cause or contributory cause is 100 percent probable if the probabilities are retrospective. A court therefore cannot apportion compensation on the basis of retrospective probabilities. Prospective probabilities, however, are irrelevant to cause and so cannot apportion compensation on its basis.²⁶¹ Walking to work through an area populated by experienced armed robbers may increase the probabilities of being robbed, but one might still be robbed for causes that have nothing to do with walking through such an area (say, if the victim is robbed there by someone who is not an experienced armed robber).²⁶² Moreover, comparative prospective probabilities do not correspond to sensible proportional obligations to compensate. Drivers of Ferraris may be more likely to mow down pedestrians than drivers of Fords, but if the negligence of both combines to injure a victim, compensation does not demand that the Ferrari driver pay more and the Ford driver pay less.²⁶³

Mixed motive cases feature not only those logical obstacles to probabilistic diminution of relief but also strong policies favoring full compensation.²⁶⁴ Even if proportional probabilities were permitted to influence compensation, they

should depend on the extent to which such conditions affect the present and future value of the interest lost.

Id. at 1360 (footnote omitted). King would express the contribution of the tortious conduct in terms of enhanced probability. *Id.* at 1387-90. He would extend the idea of compensation based on probabilities to award damages based on all loss of chances of a favorable outcome, and all enhancement of chances of an unfavorable outcome, even when the chances lost or gained are less than 50%. *Id.* at 1354. Professors Rizzo and Arnold apply similar ideas to cases of simultaneous (rather than preexisting) causal conditions. Rizzo & Arnold, *Causal Apportionment in the Law of Torts: An Economic Theory*, 80 COLUM. L. REV. 1399 (1980); see Rizzo & Arnold, *Causal Apportionment: Reply to the Critics*, 15 J. LEGAL STUD. 219 (1986).

260. Wright, *The Efficiency Theory of Causation and Responsibility: Unscientific Formalism and False Semantics*, 63 CHI.-[]KENT L. REV. 553, 560 (1987). For additional criticisms, see Kaye & Aickin, *A Comment on Causal Apportionment*, 13 J. LEGAL STUD. 191 (1984); Kelman, *supra* note 182, at 608-21; Kruskal, *Terms of Reference: Singular Confusion About Multiple Causation*, 15 J. LEGAL STUD. 427 (1986).

261. Indeed, many scholars contend that there is no defense except convenience for even the limited probabilistic or other apportionment that occurs when a court rejects a causal factor as not dominant or not a substantial factor. Wright, *supra* note 22, at 1782-83; see Green, *supra* note 176, at 554. There is no coherent definition of what condition or act is more substantial than any other when more than one combine to bring about a harm. See Epstein, *Causation—In Context: An Afterword*, 63 CHI.-[]KENT L. REV. 653, 671 (1987); Kruskal, *supra* note 260, at 435 & n.9.

262. See Kelman, *supra* note 182, at 603.

263. The example highlights another problem in using probabilities, that of perspective used in assessing the prospective probabilities. From the pedestrian's standpoint, she is far more likely to be hit by a Ford than a Ferrari, because there are more Fords.

264. See *infra* text accompanying notes 284-97.

should not override relevant policy considerations.²⁶⁵

5. Compensation in Perspective

The law does not make strict compensation an absolute goal. Considerations of deterrence, expression of the community's sense of justice, or prevention of self-help may outweigh the narrow goal of avoiding overcompensation.²⁶⁶ For mere convenience, courts use artificial damage rules even though the rules may overcompensate or undercompensate in individual cases.²⁶⁷ To afford extra protection to property rights, courts impose restitutionary remedies, which far exceed compensation for plaintiff's loss.²⁶⁸ The concept of permitting overcompensation in order to achieve other goals is a familiar one throughout the field of equitable remedies. At equity, courts implement remedies that exceed the narrow violation of rights on which the remedies are based in order to prevent recurrence of unlawful conditions,²⁶⁹ or, more broadly, in order to give "mean-

265. See *infra* text accompanying notes 298-328. Professor Robert Cole puts forward a sophisticated approach to remedies for negligence that uses probabilities to adjust damages in some cases. Cole, *Windfall and Probability: A Study of "Cause" in Negligence Law: Part One, Uses of Causal Language*, 52 CAL. L. REV. 459 (1964) [hereinafter *Cole, Part One*]; Cole, *Part Two, Factual Uncertainty and Competitive Fairness*, 52 CAL. L. REV. 764, 802 (1964) [hereinafter *Cole, Part Two*]. In general, Cole maintains that the concept of factual cause derives its meaning from economic, social, and moral ideas about who should pay. As long as the defendant has something to do with the injury, the function of the question of causation in negligence cases is simply to pose the question whether it is appropriate to make the defendant pay. Cole, *Part One, supra*, at 473; see *id.* at 498. Cole recognizes that probabilities play a role in the formation of all causal beliefs, Cole, *Part Two, supra*, at 785, and so they influence whether it is appropriate for someone who has enhanced the probabilities of the occurrence to pay when it occurs. He emphasizes, however, that negligence law should not always seek to discover and apply the probabilities of events that did not take place. The effort is impossible to achieve and costly to attempt. *Id.* at 784-90. It is worthwhile to estimate probabilities and reduce damages only in cases where the task is easy and an outside observer would class an award of full damages as a windfall. *Id.* at 812-13. The classification of damages as windfalls or not thus returns the theory to its point of departure: economic, social and moral policies that form the compensatory and retributive aims of tort law. Cole, *Part One, supra*, at 498. Although its use of probabilities is vulnerable to Professor Wright's and others' challenges, Cole's theory at least recognizes that both ordinary language and the well-considered opinions of the courts use economic, moral and social policy to influence what they mean when they speak of compensation.

266. See Thode, *supra* note 254, at 430-31. Although Professor Weinrib argues that equality and corrective justice require a torts system in which the tortfeasor is liable only to the extent that it has caused the victim harm, Weinrib, *Causation and Wrongdoing, supra* note 178, at 426, 450, Professor Coleman persuasively responds that any system of uniform rules ensures equality, and that the demands of corrective justice depend simply on the definition of the rights the system will protect, Coleman, *Property, Wrongfulness and the Duty to Compensate*, 63 CHL.-[KENT L. REV. 451, 458, 463 (1987).

267. D. DOBBS, *supra* note 142, at 799; see *supra* note 181; cf. C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 16 (1935) (discussing limits on avenues of attack on damages awards chosen by juries even where support for award is weak).

268. D. DOBBS, *supra* note 142, at 223. This is not to propose a restitutionary remedy in the cases under consideration, but simply to show that the legal system frequently subordinates the goal of exact compensation. In discrimination cases, the gain to the discriminator may be less than the harm to the person discriminated against. R. POSNER, *supra* note 224, at 615; cf. D. LAYCOCK, *supra* note 181, at 494 (discussing restitution for failures to make safety expenditures in accident cases).

269. *E.g.*, *Hutto v. Finney*, 437 U.S. 678, 690-91 (1978); *Bailey v. Proctor*, 160 F.2d 78, 81 (1st Cir.), cert. denied, 331 U.S. 834 (1947). Professor Laycock criticizes the latter case, but notes that it "represents a . . . tradition" in which once a case is brought into equity, the chancellor is to set it right, rather than merely restore the plaintiff to an original position. D. LAYCOCK, *supra* note 181,

ing to our public values."²⁷⁰

Even if a court were to apply the narrowest but-for concept of compensation, the court would have to compensate the hidden injuries of discrimination. For example, an applicant who is excluded by discrimination early in the application process might have been considered for a job other than the one for which she applied, or the job might have been modified to meet the applicant's abilities or special needs.²⁷¹ Simply matching the qualifications of the applicant with the requirements of the job yields a totally misleading answer to the question whether the employer would have hired the applicant if it had not discriminated. There is no good way ever to know if any of the possible contingencies might have taken place, and the defendant can easily manipulate what scarce information might support a guess on the subject. Even if the chances of such an occurrence are modest for any individual job application, the chances rise with additional applications and additional discriminatory rejections.²⁷² Full relief in mixed motive cases ensures compensation for those losses.

B. Deterrence

Imposing full damages and other relief on the defendant when the harm would have happened anyway enhances the deterrent effect of the antidiscrimination laws. The laws seek to eliminate discrimination. Imposing remedies even when other causes would have had the same result increases deterrence by raising the likelihood of sanction.²⁷³ As a general matter, deterrence does not hinge on causation.²⁷⁴ Indeed, the criminal law deters wrongdoing by punishing attempts and other conduct in which the wrongdoer's actions fail to cause harm in any sense.²⁷⁵ Accordingly, the criminal law imposes full punishment when the defendant's conduct is a substantial factor in bringing about harm, even if

at 251; see Goldstein, *A Swann Song for Remedies: Equitable Relief in the Burger Court*, 13 HARV. C.R.-C.L. L. REV. 1 (1978).

270. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 14 (1979).

271. See *School Bd. v. Arline*, 480 U.S. 273, 287 n.17 (1987) (discussing reasonable accommodation to permit handicapped employee to perform job).

272. Discussing the economic loss from discrimination, Professor Posner notes that while discrimination by whites harms whites, it harms blacks more, because blacks make up a much smaller section of the American population and control much less of its economy. R. POSNER, *supra* note 224, at 615-16. Because discrimination often takes place in secret, it is probable that many discriminators escape liability. That secrecy enhances the likelihood of uncompensated injury of the type discussed in the text, if the court adheres to *Mount Healthy* ideas of compensation.

273. See *infra* text accompanying note 280.

274. If specific deterrence were the only goal of tort law, collectively proscribed behavior would be penalized regardless of whether in a specific instance it was a *but for* cause of harm. If drunken driving were forbidden because of its accident-causing potential, the drunken driver would be penalized whether he had been caught as a result of chance, of an accident, or of some other attention-getting behavior. Moreover, even if the driver were caught because he had been involved in an accident, a penalty would be imposed without reference to the specific cause of the accident

Calabresi, *supra* note 178, at 79 (emphasis in original); see Wright, *Actual Causation vs. Probabilistic Linkage: The Bane of Economic Analysis*, 14 J. LEGAL STUD. 435, 441-44, 453-54 (1985). Brodin makes a similar point with respect to mixed motive discrimination. Brodin, *supra* note 12, at 317-19.

275. W. LAFAYE & A. SCOTT, *supra* note 177, § 3.12(b), at 280 (collecting cases).

the but-for test is not satisfied.²⁷⁶ The merit of this position is not limited to criminal cases. Enhancing deterrence is a major justification for restitution and other equitable remedies that do more to prevent recurrence of wrongdoing than merely compensating the plaintiff for the violation of law on which the suit is based.²⁷⁷

Nevertheless, some argue that awarding full remedies when the harm would have occurred anyway will create overdeterrence.²⁷⁸ Imposing the same penalty for mixed motive and sole motive discrimination will not overdeter the wrongful conduct. On the contrary, the prospect of escaping any penalty for discriminating underdeters that conduct.²⁷⁹ It is the expectation of liability that deters wrongdoing.²⁸⁰ Potential wrongdoers will not choose adequate levels of care in negligence cases or adequate levels of internal antidiscrimination activity unless there is at least the possibility that the full cost of the wrongdoing may fall on them.²⁸¹ Even if the law imposes liability on wrongdoers for events that they could not have prevented, the sanctions will not overdeter in the sense of inducing inefficient behavior.²⁸² According to Professors Landes and Posner, an economically rational actor will not engage in wrongdoing if the damages are one cent over the benefit from the wrongdoing. Thus the actor will not violate the law, and the "excessive" liability will never be imposed.²⁸³

C. Community Sense of Justice

The basis of the laws against discrimination is justice.²⁸⁴ Other grounds for imposition of liability find primary support in efficiency, tradition, or political considerations, but discrimination entails liability because it is wrong.²⁸⁵ Race

276. *Id.*

277. See *supra* notes 268-69 and accompanying text.

278. See H. HART & T. HONORE, *supra* note 167, at lxxii-lxxiii (distinguishing "market" from "collective" deterrence).

279. Eaton, *supra* note 13, at 456; see Wright, *supra* note 274, at 442 (failure of market deterrence due to unrecovered costs of litigation and limits on the valuation and legal recovery of actual losses).

280. Landes & Posner, *Joint and Multiple Tortfeasors: An Economic Analysis*, 9 J. LEGAL STUD. 517, 520 (1980). Landes and Posner point out that it is a confusion of *ex ante* and *ex post* causation to argue that because resources should not be spent to deter the inevitable, damages should not be awarded when the harm would have occurred anyway. *Id.*

281. See *id.* at 524-25; Wright, *supra* note 260, at 569-71.

282. Landes & Posner, *supra* note 178, at 117.

283. *Id.* Landes and Posner nevertheless claim, contrary to the case law, see *supra* text accompanying notes 109-42, that "the law does not impose liability in cases in which taking care would not have avoided the accident that occurred," because of administrative costs and the fact that an element of strict liability exists in negligence cases, Landes & Posner, *supra* note 178, at 118. Intentional discrimination contains no such element of strict liability, so the only problem is administrative costs, the cost of transferring money in cases in which the wrongdoer behaves irrationally or the system commits an error. Any enhancement in administrative costs is justified to end the current state of underdeterrence and to accomplish the other goals of antidiscrimination remedies. The common law does just that in some of the areas already surveyed. See Calabresi, *supra* note 178, at 100-01.

284. Professor Spann suggests that subjective conceptions of justice are not only the foundation of the law, but the only basis that the courts actually use for interpreting it. Spann, *Simple Justice*, 73 GEO. L.J. 1041 (1985).

285. Debate rages about whether, and to what extent, antidiscrimination law promotes economic

discrimination offends the community sense of justice for two reasons: first, a person's race is not an accurate predictor of that individual's merit as an employee, customer, or voter; second, a person's race is totally beyond that individual's control.²⁸⁶ Discrimination on sex, religion, and other grounds offends the community's sense of justice for the same reasons. Moreover, discrimination against any group wrongly subordinates the human dignity of the group and its members.²⁸⁷ Laws forbidding discrimination thus advance the moral thrust of social justice.²⁸⁸

Discrimination offends social justice regardless of whether the adverse effect of the discrimination would have occurred anyway. The immorality of acts does not depend on their efficacy.²⁸⁹ Imposing full relief in mixed motive cases will vindicate the community's moral standards.

Closely linked to justice and morality in the enforcement of discrimination laws is the prevention of attempts at self-help. If the government does not provide means of redress when persons suffer wrongs that trigger their moral outrage, the victims will try to obtain redress even at the cost of the public order. Just as prevention of disorderly self-help solutions is important in such areas of the law as contracts²⁹⁰ and criminal law,²⁹¹ so it is vitally important in the field of antidiscrimination. Indeed, the Civil Rights Act of 1964 and subsequent enactments grew out of violent social struggle provoked by blacks' self-help efforts to achieve equality.²⁹² Reducing the inclination of members of disfavored groups to take their grievances to the streets depends on the elimination of discrimination in all instances in which adverse effects take place. That is so irrespective of whether the adverse effects would have occurred for other reasons.

Some members of the community might feel less outrage when the factor that would have produced the adverse effect in the absence of the discrimination is of the victim's own making, such as absenteeism or the failure to obtain job training. Even granting that the special merit, innocence, or vulnerability of the

efficiency. See, e.g., Donohue, *Further Thoughts on Employment Discrimination Legislation: A Reply to Judge Posner*, 136 U. PA. L. REV. 523 (1987); Donohue, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411 (1986); Posner, *The Efficiency and Efficacy of Title VII*, 136 U. PA. L. REV. 513 (1987).

286. See Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 241 (1971).

287. See Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986).

288. Equality lies at the base of the modern contractarian view of social justice. See J. RAWLS, *A THEORY OF JUSTICE* § 77, at 505-07 (1971).

289. See Rothstein, *Causation in Torts, Crimes, and Moral Philosophy: A Reply to Professor Thomson*, 76 GEO. L.J. 151 (1987) (defending view); Thomson, *The Decline of Cause*, 76 GEO. L.J. 137 (1987) (attributing view to "moral sophisticates" and questioning it).

290. There is more than one purpose underlying the rules of law that provide for the giving of damages for breach of contract. One of the ends to be obtained is, without doubt, the keeping of the peace. The party injured by the breach has a sense of grievance. In the absence of a public remedy, he would do his best to redress his own wrong. This means private war, with all of the resulting harm that it entails to the interests of other people.

5 A. CORBIN, *supra* note 145, § 1002.

291. 2 J. STEPHENS, *HISTORY OF THE CRIMINAL LAW IN ENGLAND* 80 (1883).

292. President Kennedy endorsed fair employment legislation in a speech that stressed the "rising tide of discontent that threatens the public safety" in the wake of black protests and violent white reaction. 109 CONG. REC. 11,174 (June 19, 1963). See generally F. PIVEN & R. CLOWARD, *POOR PEOPLE'S MOVEMENTS* 206-39 (Vintage ed. 1979) (discussing history of the civil rights movement).

victim of a wrongful act may inspire greater sympathy than would otherwise occur, prevailing conceptions of morality do not excuse wrongful conduct on the ground that the victim is not meritorious, innocent, or vulnerable.²⁹³

The moral force behind antidiscrimination law strengthens the argument against applying contributory or comparative fault analogies. The employer has not been simply careless. It has treated the victim as less than human.²⁹⁴ Its conduct, moreover, has reinforced the powerlessness and coercion that women and minorities experience.²⁹⁵ Just as contributory negligence does not bar liability for intentional torts²⁹⁶ or for wanton and willful misconduct,²⁹⁷ the victim's job failings should not bar liability for intentional discrimination.

D. Consistency with Title VII

Even if the proposed approach to mixed motive discrimination satisfies the goals of compensation, deterrence and vindication of the community sense of justice, it must be consistent with statutory provisions and practicality. Analyzing Title VII of the Civil Rights Act of 1964²⁹⁸ shows that full relief in mixed motive cases furthers statutory policy.

The Supreme Court has declared that the "central statutory purposes" of Title VII are "eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."²⁹⁹ The former purpose suggests a deterrent orientation.³⁰⁰ Awarding full relief in mixed motive cases will promote deterrence.³⁰¹ The latter purpose compels courts to apply a "presumption in favor of retroactive liability [which] can seldom be overcome."³⁰² Logically, it also should compel courts to impose full relief, not to eliminate liability, whenever the harm would have occurred in the absence of discrimination. Expression of the community's sense of justice and prevention of self-help are also among the purposes of Title VII remedies.³⁰³ Full relief will promote those purposes.

The language of Title VII provides for such remedies as hiring, reinstatement,

293. See W. LAFAVE & A. SCOTT, *supra* note 177, § 3.12(a), at 791 (discussing extortion). Obviously, any approach could bar relief if the "victim" of mixed motive discrimination is not a victim at all but instead asserts a false claim to achieve a fraudulent settlement or verdict. Considerations of practicality of relief for some persons who lack the qualifications to take advantage of it are discussed *infra* text accompanying notes 319-23.

294. See Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387, 391-93 (1967).

295. See Colker, *supra* note 287, at 1008-10 nn.15-17.

296. W. PROSSER & W. KEETON, *supra* note 43, § 65, at 462.

297. *Id.*

298. 42 U.S.C. § 2000e to 2000e-17 (1982).

299. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975); see *Price Waterhouse*, 109 S. Ct. at 1798 (O'Connor, J., concurring).

300. See *Price Waterhouse*, 109 S. Ct. at 1798 (O'Connor, J., concurring) ("Like the common law of torts, the statutory employment 'tort' created by Title VII has two basic purposes. The first is to deter conduct which has been identified as contrary to public policy and harmful to society as a whole."); 2 C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 247, § 15.1, at 53-55.

301. See *supra* text accompanying notes 273-83.

302. *City of Los Angeles v. Manhart*, 435 U.S. 702, 719 (1978).

303. See *supra* notes 284-97 and accompanying text.

ment and back pay, with no limit other than a court's determination of what is appropriate.³⁰⁴ Courts must apply a presumption of back pay when exercising that discretion.³⁰⁵ Title VII generally restricts remedies to equitable relief,³⁰⁶ but that restriction does not cut against back pay and hiring in mixed motive cases. Equity has no distinct remedial rule more restrictive than that found in the common-law cases on mixed motive and concurrent cause. In fact, equity generally tolerates a greater disjunction between injury and remedy than does the common law.³⁰⁷

Some might argue against full relief on the basis of section 706(g) of the statute:

No order of the court shall require . . . the hiring, reinstatement, or promotion of an individual . . . or the payment to him of any back pay, if such individual . . . was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title [retaliation].³⁰⁸

Congress' use of the words "for any reason other than" does not appear to be an effort to eliminate liability or limit relief in mixed motive cases. If that had been Congress's purpose, the lawmakers probably would have used the language "solely on account of."³⁰⁹ Congress rejected an amendment that employed that language³¹⁰ and would have restricted liability to cases in which discrimination was the sole cause.³¹¹

Congress modeled section 706(g) on a National Labor Relations Act provision³¹² that had been interpreted to permit "dual motive" cases, in which courts gave reinstatement and full back pay, even though the victims of discrimination would have been discharged on other grounds.³¹³ Congress' rejection of the sole purpose language³¹⁴ and its application of the National Labor Relations Act model demonstrates that it meant to permit full relief in mixed motive cases.³¹⁵

304. If the court finds that the respondent has intentionally engaged or is intentionally engaging in an unlawful employment practice . . . the court may enjoin the respondent . . . and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g) (1982).

305. See *supra* note 302 and accompanying text.

306. 2 C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 247, § 15.1, at 54.

307. See *supra* text accompanying notes 269-70.

308. 42 U.S.C. § 2000e-5(g) (1982).

309. This language is found in a few retaliatory eviction statutes. See *supra* note 124 and accompanying text.

310. 110 CONG. REC. 13,837-38 (June 15, 1964).

311. Vaas, *supra* note 197, at 456.

312. 29 U.S.C. § 160(c) (1982).

313. NLRB v. West Side Carpet Cleaning Co., 329 F.2d 758, 761 (6th Cir. 1964); NLRB v. Symons Mfg. Co., 328 F.2d 835, 837 (7th Cir. 1964); NLRB v. Whitin Mach. Works, 204 F.2d 883, 885 (1st Cir. 1953).

314. See *Price Waterhouse*, 109 S. Ct. at 1785 & n.7 (plurality opinion).

315. Nevertheless, the use of the singular "reason" may have been an endorsement of the idea that a court should find a dominant reason, that is, in cases of mixed motive, a dominant motive. Under this interpretation, the court should act as though the dominant motive were the sole active

Miscellaneous statements in the legislative history of Title VII and judicial constructions of that history speak of victims' "restor[ation] to a position where they would have been were it not for the unlawful discrimination"³¹⁶ or declare that "[t]he injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed."³¹⁷ Those statements do not address mixed motive cases in particular and seem intended to support an expansive interpretation of the remedies available under the statute; they do not undermine the idea of full relief in mixed motive cases. Significantly, the Supreme Court has held that those statements, as well as the restriction on relief in section 706(g), do not operate to bar Title VII remedies that benefit even nonvictims of discrimination, when the discriminatory conduct is sufficiently outrageous and cannot be corrected by other means.³¹⁸

force in the decision to hire or discharge, and award full relief in Title VII mixed motive cases only upon a showing that the discriminatory motive was dominant, rather than that it was a substantial factor. But Justice Brennan's plurality opinion in *Price Waterhouse* casts doubt on any such interpretation. The opinion analyzed the interpretation of section 706(g) in pattern and practice suits and class actions and its origin in a National Labor Relations Act similarly applicable in company wide or industry wide actions. It concluded that "the proper focus of § 706(g) is on claims of systemic discrimination, not on charges of individual discrimination." *Id.* at 1788 n.10. Thus the provision may be wholly irrelevant to the question at hand.

316. 118 CONG. REC. 7168 (March 6, 1972).

317. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418-19 (1975).

318. *Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 445-75, 483-84 (1986). That holding goes significantly beyond the proposal in this Article that relief extend to actual victims of discrimination when the victims would nevertheless have suffered the adverse effect complained of. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), reversed the affirmance of a consent decree that imposed layoffs on white employees while retaining blacks with less seniority. *Stotts* does not bar this Article's proposal, for it only restricts some forms of relief for nonvictims of discrimination. *See id.* at 579-80.

Both the *Price Waterhouse* plurality and Justice White laid great stress on the analogy between mixed motive cases brought under Title VII and *Mount Healthy City School District Board of Education v. Doyle*, a mixed motive case brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982). The logic of compensation and deterrence that calls for liability and full relief in Title VII cases would apply equally to section 1983 cases. Moreover, liability and full relief would further the particular statutory policy of section 1983.

Section 1983 does not provide substantive rights, but it does establish a private right of action to remedy claims against persons acting under color of state law who have violated federal statutes and constitutional provisions. *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 618 (1979). Among those federal substantive laws are several prohibiting discrimination, such as the equal protection clause of the fourteenth amendment to the United States Constitution and the political and religious freedom provisions of the first amendment.

Congress enacted section 1983 as part of the Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, in order to permit black victims of officially protected racial misconduct to bypass hostile state court systems; its text leaves its remedies entirely open ended. Under prevailing interpretations, appropriate relief includes compensatory damages, *Monroe v. Pape*, 365 U.S. 167, 172 (1961), punitive damages, *Smith v. Wade*, 461 U.S. 30, 56 (1983), and nominal damages, *Carey v. Piphus*, 435 U.S. 247, 266 (1978), as well as wide-ranging injunctive relief, *see Hutto v. Finney*, 437 U.S. 678, 687 (1978).

In determining the propriety of relief under section 1983, the Supreme Court looks first to the common law of torts. *Smith*, 461 U.S. at 34; *Carey*, 435 U.S. at 257-58; *see Martinez v. California*, 444 U.S. 277, 285 (1980). The common law consensus, to which *Mount Healthy* is the exception, is the rule of full relief. The Court makes "such modification or adaptation as might be necessary" in the common law "to carry out the purpose and policy" of section 1983. *Smith*, 461 U.S. at 34. But because the remedial policy of section 1983 is to compensate victims, deter wrongdoers, and vindicate the law, *see Carey*, 435 U.S. at 254-57 & n.11, the rule of full relief advances the purpose and policy of the statute. Of course, if one believes that section 1983 lacks those remedial goals, section 1983 and *Mount Healthy's* interpretation of it provide little guidance for Title VII, and should be disregarded in deciding mixed motive cases brought under that statute.

E. Practicality

In some cases, practical considerations may call into question the wisdom of granting full relief to victims of mixed motive discrimination. The most difficult cases are those in which full relief for discrimination entails an order to hire or reinstate. For example, if an airline discriminates in denying a black a job as a pilot, a court nonetheless would hesitate to order the airline to hire the victim to fly planes unless the victim has the ability to do so. When hiring or reinstatement would cause undue hardship to the defendant or nonparties, the court should employ substitute relief.³¹⁹

Applying current doctrine, courts frequently have found alternatives to hiring and reinstatement orders. Substitute solutions include front pay, that is, pay until hiring or for a set period, and compelled funding of remedies other than employment.³²⁰ Those solutions have proven especially valuable in cases in which there are multiple claimants for the same job or in which the job has been eliminated during the pendency of litigation.³²¹

Courts in those cases have applied the general rule that undue hardship bars injunctive relief and compels the creation of alternative remedies, even when the alternative remedies are not a complete substitute for injunctive relief. The rule is familiar in equity.³²² At least one authority suggests that law applies a similar approach, avoiding crushing damages awards through artificial rules about proximate cause and remoteness of injury.³²³ Courts using the approach to mixed motive discrimination advanced in this Article will need to apply the

319. In a recent article, Professor West collects and analyzes research on reinstatement of employees under National Labor Relations Act and other proceedings. West, *The Case Against Wrongful Discharge*, 1988 U. ILL. L. REV. 1. His research shows that reinstatement generally has been an ineffective remedy for wrongful discharge, particularly if it takes place more than a few months after the event. Half the workers refuse reinstatement or trade it for a cash settlement. *Id.* at 28. Many resign less than a year after being rehired, citing employer harassment. *Id.* at 29. Professor West concludes that states abolishing at-will employment and establishing remedies for wrongful discharge should not adopt hiring or reinstatement as an exclusive remedy; instead, they should consider such measures as statutory damages plus back pay until the employee finds comparable employment. *Id.* at 65. If more employees learn of the reality of reinstatement, there may be more willingness to trade that relief for money, and therefore less practical difficulty with the approach to mixed motive discrimination proposed by this Article. Moreover, if employers learn the same lesson, they may be less inclined to resist the remedy, knowing that the employee is not likely to last long after returning. Professor West's work makes substitutes to hiring or reinstatement appear to be the best options in a wide variety of cases.

320. See, e.g., *King v. Staley*, 849 F.2d 1143, 1144-45 (8th Cir. 1988) (front pay); *Green v. USX Corp.*, 843 F.2d 1511, 1532 (3d Cir. 1988) (front pay for two years when no job openings likely for extended period of time); *vacated*, 109 S. Ct. 3151 (1989); *Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108, 1123-24 (3d Cir. 1988) (temporary salary increase and order to hire when suitable position becomes available); *Williams v. Boorstein*, 451 F. Supp. 1117, 1127 (D.D.C. 1978) (order of funding to assist victims of discrimination to assert grievances), *rev'd*, 663 F.2d 109 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 985 (1981).

321. See, e.g., *Easley v. Anheuser-Busch, Inc.*, 758 F.2d 251, 263-64 (8th Cir. 1985) (layoff before decision in case); *Edwards v. Department of Corrections*, 615 F. Supp. 804, 811 (M.D. Ala. 1985) (displacement of innocent employee).

322. For example, courts deny specific performance and substitute cash damages when plaintiff is the innocent victim of defendant's breach of contract to violate a trust. 11 W. JAEGER, *WILLISTON ON CONTRACTS* § 1429 & n.6 (3d ed. 1968) (citing *Cyrus v. Holbrook*, 32 Ky. L. Rep. 466, 106 S.W. 300 (1907); *Repetto v. Baylor*, 61 N.J. Eq. 501, 48 A. 774 (1901)).

323. See D. LAYCOCK, *supra* note 181, at 151-70, 926-29.

same undue hardship standards to avoid remedies that would cause severe dangers to employers or the general public.

One commentator suggests a further practical objection to the present proposal in cases involving governmental defendants.³²⁴ He hypothesizes that *Mount Healthy's* real purpose in constitutional torts cases against government officials is to protect the officials from court orders that they would view as impractical or unduly intrusive.³²⁵ Still, he stops short of approving the case's achievement of that goal, and he acknowledges that the effect is to override the goals of compensation, vindication and deterrence in order to encourage "governmental freedom to act."³²⁶

The value of compensation, vindication (which includes reinforcing the community's sense of justice and furthering the law's policy), and deterrence should far outweigh the value of license to discriminate in violation of the law. The conclusion is no different in constitutional torts than in the statutory tort of employment discrimination. It might be argued that restrictions on remedies protect not discrimination, but conduct in which there is no discrimination and in which liability is wrongly imposed by another rule's shift in the risk of error.³²⁷ Yet limiting remedies cannot prevent any error that cannot be prevented better by such ordinary means as cautionary instructions to factfinders, or good faith, sovereign, and absolute immunities from some monetary relief.³²⁸

V. CONCLUSION

This Article has posited that an approach to mixed motive discrimination that requires full relief is superior to the approach of the Court in *Price Waterhouse*. Not only is such an approach consistent with common law analogies, but it is also supported by causation theory. Most significantly, that approach to mixed motive cases advances the remedial goals of compensation, deterrence, and vindication of the community sense of justice, and satisfies the terms and policies of Title VII. There may be the risk that in some cases the imposition of full relief will create undue hardship, but courts have ordinary correctives to handle that problem. They may reduce or tailor remedial action to prevent inappropriate results, while still vindicating the laws that forbid discrimination. *Price Waterhouse* and its immediate forebear, *Mount Healthy*, are a radical departure from the common law's approach to mixed motive cases. Policy justifies not that departure, but a new approach rooted in long-established precedent.

324. Eaton, *supra* note 13.

325. *Id.* at 457. The decision creates a zone of noninterference for governmental functions, even when governmental conduct violates the Constitution. *Id.* at 457 n.75.

326. *Id.* at 461.

327. *See id.* at 458 n.80.

328. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815-19 (1982) (qualified immunity); Imbler v. Pachtman, 424 U.S. 409, 427 (1976) (absolute immunity); Edelman v. Jordan, 415 U.S. 651, 673-74 (1974) (sovereign immunity protected under eleventh amendment to United States Constitution). Indeed, shifting the burden of persuasion to the defendant on the issue whether it would have made the same decision anyway is an attempt by the Court to make the risk of error fall in favor of the plaintiff, on policy grounds. *See Price Waterhouse*, 109 S. Ct. at 1802-03 (O'Connor, J., concurring).

One might wonder what has so effectively obscured logically applicable precedent and congressionally imposed policy. One of the themes of Professor Bell's recent book, *And We Are Not Saved*,³²⁹ is that when conventional legal rules work too effectively to promote the civil rights of blacks, the rules change; society through its legislatures and courts applies the rules differently or invents a new exception and says it was there all along.³³⁰ Rules that give damages for malicious prosecution are one thing. Rules that give damages for employment discrimination are quite another. It does not matter what the statute says; management prerogatives trump the civil rights of minorities and women.

Bell's pained, though not hopeless,³³¹ view of law and race in America remains a minority position in both senses of the term.³³² No one can say whether it represents the future of antidiscrimination law or an unduly negative view of its past. *Price Waterhouse* neither exemplifies nor refutes Bell's theme. The plaintiff still has a chance to win a high-level job and large damages. Her case perhaps has already provoked a change in the outward behavior of companies like Price Waterhouse. She and those with similar cases benefit from a shift in the burden of persuasion, a procedural advantage that ever fewer civil rights plaintiffs enjoy.³³³ Nevertheless, the rules the Supreme Court has applied to her case are not the same as the rules for analogous cases outside the antidiscrimination field. The rules defy logic and policy. The future course of those rules may thus test Bell's thesis.

329. D. BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987). The book is expanded from Professor Bell's *Harvard Law Review* Foreword to the 1984 Supreme Court Term, Bell, *The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985). The book and the article consist of a dialogue between the author and a black civil rights lawyer recovering from dementia who has experienced visions that show her the futility of conventional legal efforts to achieve racial equality.

330. See, e.g., D. BELL, *supra* note 329, at 66-68 (discussing reapportionment law). Although the book contains a discussion of the experience of black women, it is unclear whether its thesis might extend to women who are not black, or to victims of religious prejudice and ethnic minorities other than blacks. See *id.* at 176-214. But see *id.* at 210-11 (discussing society's "patriarchal order"). The proposal made in this Article would protect the rights of women and victims of religious and ethnic prejudice. For analyzing the significance of Professor Bell's position, however, it is important only that the proposal would advance the interests of blacks.

331. At the end of the book, Professor Bell suggests that civil rights litigation, in combination with hoped-for social developments, might lead to a change in pervasive discrimination against blacks. See *id.* at 249-58.

332. Although the reviews of the book were generally favorable, e.g., Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?* (Book Review), 97 YALE L.J. 923 (1988); Kennedy, Book Review, 86 MICH. L. REV. 1130 (1988); Yu, Book Review, 23 HARV. C.R.-C.L. L. REV. 287 (1988), it is doubtful that their authors represent the mainstream of American opinion.

333. See *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2126 (1989).

